Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

KAREN WAESCHLE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioner,

v.

LJUBISA J. DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, AND OAKLAND COUNTY, MICHIGAN, A MUNICIPAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

Whether federalism prevents a federal court from certifying to a state court a question of whether certain property rights are protected by the U.S. Constitution against taking without due process, where the federal court in prior published decisions had announced that such rights were federally protected?

Whether a state court ruling on what constitutes a property right under state law may be applied by a federal court in a way that retroactively destroys federal 'taking' rights which have already vested?

Whether the fundamental structure and principles of federalism prevent a federal court from certifying a question on the issue of the interests of the next of kin in the remains of their deceased loved ones to the Michigan Supreme Court when the Sixth Circuit has previously determined that the rules, understandings and caselaw—the bundle of rights—Michigan recognizes with regard to the remains of a deceased loved ones rise to the level of a legitimate claim of entitlement in the next of kin protected by the Fourteenth Amendment?

Whether there is a fundamental right in a loved one's human remains that is protected by the Federal courts and Constitution?

Whether the Circuit court erred in ignoring prior Circuit precedent by granting summary judgment on qualified immunity and by dismissing petitioner's case?

Whether the Circuit court erred in ruling a citizen's right to their loved one's body was not "clearly established" when the same Circuit had previously held such right was "clearly established" and protected by the Federal Constitution?

Whether this panel's decision has so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's supervisory power; in that if each panel in each Circuit can individually overrule the Circuit's precedent, there is no uniformity of the Federal law?

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Opinions Below

The decision of the district court was not officially reported but is reproduced in the Appendix at C. The first opinion of the Sixth Circuit was not officially reported but is available at 072209 FED6, 08-2228 and is reproduced in the Appendix at B. The Amended opinion for the Sixth Circuit was published and can be found at 576 F.3d 539 (6th Cir. 2009) and is reproduced in the Appendix at A. The Sixth Circuit's order declining en banc review was not reported but is reproduced in the Appendix at D.

Jurisdictional Statement

Petitioner respectfully requests this Court to grant her petition for a Writ of Certiorari to review the Sixth Circuit's decision in *Waeschle v. Dragovic*, 576 F.3d 539 (6th Cir. 2009) which was decided on August 14, 2009. The panel withdrew the original opinion and issued this revised opinion, which still is contrary to Circuit precedent, but also now certifies the case to the Michigan Supreme Court. Petitioner moved for a rehearing *en banc*, which was denied on October 23, 2009. *Waeschle v. Dragovic*, Case No. 08-2228, 2009 U.S. App. LEXIS 23708 (6th Cir. Oct. 23, 2009). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

U.S. Const. amend. VII [1791]

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no

> fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. Const. amend. XIV, § 1 [1868]

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

6 Cir. I.O.P. 206:

> (c) Published Opinion Binding
>
> Reported panel opinions are biding on subsequent panels. Thus, no subsequent panel overrules a published opinion or a previous panel. Court en banc consideration is required to overrule a published opinion of the court. (Dec. 1, 1998)

Statement of the Case

Petitioner brought this action, on behalf of herself and others similarly situated, pursuant to 42 U.S.C. Section 1983 which provides redress for the violation of rights secured by the Constitution and laws of the United States. Petitioner's claim was that the Medical Examiner for Oakland County, Michigan, violated petitioner's protected rights when after he had

completed his autopsy and his jurisdiction ceased, he destroyed her mother's brain. The medical examiner provided no notice to petitioner that her mother's brain had been retained when the rest of her mother's remains were released to petitioner and did not afford petitioner the opportunity to direct the disposition of her mother's brain in accordance with her personal and religious beliefs.

Defendants moved to dismiss petitioner's claims pursuant to Civ. R. 12(b)(6) on the basis that petitioner had failed to state a claim on the issue of the existence of a constitutionally protected right and moved for summary judgment pursuant to Civ. R. 56 on the basis of qualified immunity. On September 19, 2008 the District Court ruled that the petitioner had constitutionally protected right in her loved one's dead body and that those rights were clearly established based upon specific Circuit precedent. Accordingly, the District Court denied defendants' motions to dismiss and for summary based on qualified immunity. The District Court did dismiss petitioner's state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress. *Waeschle v. Dragovic*, Case No. 08-10393, 2008 U.S. Dist. LEXIS 73103 (E.D. Mich., Sep. 19, 2008).

Defendants appealed the denial of summary judgment on the basis of qualified immunity to the Sixth Circuit under the collateral order doctrine. The Sixth Circuit reversed the denial of summary judgment as to the individual-capacity claims based on qualified immunity (7/22/09). The panel then withdrew the opinion and issued a revised opinion, which still was contrary to Circuit precedent, but also now certified the case to the Michigan Supreme Court

(8/14/09). As to the official capacity claims and the claims against the political subdivision the panel directed the District Court to certify a question to the Michigan Supreme court concerning petitioner's rights under Michigan law as to whether they were clearly established. *Waeschle v. Dragovic*, 576 F.3d at 551.

Petitioner moved for a rehearing *en banc* on the basis that the panel decision was in direct conflict with the binding precedent of the Sixth Circuit as articulated in *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs*, 58 F.3d 1111 (6th Cir. 1995) and *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991) which had already found these rights to be "clearly established" and entitled to Federal protection. On October 23, 2009 the Sixth Circuit denied petitioner's petition for rehearing. *Waeschle v. Dragovic*, Case No. 08-2228, 2009 U.S. App. LEXIS 23708 (6th Cir. Oct. 23, 2009).

1. Statement of Facts and Issues

Petitioner Karen Waeschle, plaintiff below, is the daughter of Katherine R. Weins, who is deceased. After Katherine Weins died the Medical Examiner for Oakland County, Michigan, or others on his behalf, took possession of her body and performed an autopsy. Several organs including the brain were removed for study. When the coroner was finished with the organs, he returned all except the brain, which he kept and then destroyed. This conduct was admitted to be established practice by the defendant and coroners in general.

Petitioner was never informed by the medical examiner that he had retained her mother's brain

when her mother's body was released to her. As a result, petitioner buried her mother without all of her body parts, and without any notice from defendants of that fact. Petitioner never gave consent or permission to defendants to remove and keep her mother's brain or to destroy it.

Katherine Weins's brain was not the only organ examined during the autopsy. Katherine Weins's heart, lungs, liver, stomach and other organs were examined as well. These other organs were returned to petitioner when the autopsy was completed. The brain, when examined, is removed and "fixed" by soaking it in a chemical solution for 10-14 days to make it firm enough for dissection and examination.

Katherine Weins's brain was not retained as evidence, as is permissible if a criminal matter is contemplated. It was only retained for examination, but it was not returned and was instead destroyed once its examination was completed. Petitioner has never questioned the "police power" of the State to perform the autopsy; however, the Michigan statutes do not empower the Medical Examiner to destroy federally protected property rights. While the State may take temporary custody of property, it may not, without notice and due process, destroy it.

With regard to the rights of the next of kin to possess the remains of their next of kin for disposition in accordance with their personal and religious beliefs, the relatively short delay required for the examination of the brain is not a valid basis for distinguishing Katherine Weins's brain from her body generally or from the other organs which were returned to her next of kin. No interest of the state would have been

impaired by releasing Katherine Weins's brain for disposition as directed by her daughter once the examination had been completed, just as had been done with Katherine Weins's body and other organs.

Petitioner brought this action on behalf of herself and others similarly situated in United States District Court for the Eastern District of Michigan pursuant to 42 U.S.C. Section 1983 against the Oakland County Medical Examiner, individually and in his official capacity, and against the Board of Commissioners of Oakland County. Petitioner's claim rested on the Sixth Circuit's decisions in *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs*, 58 F.3d 1111 (6th Cir. 1995) *and Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), as well as well established Michigan law.

In *Whaley*, which specifically dealt with Michigan law, the Sixth Circuit looked at the rules and understandings related to the remains of decedents in Michigan, and at Michigan Supreme Court decisions, and concluded that "[t]he Supreme Court of Michigan has repeatedly held that the next of kin '[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way.'" *Whaley*, 58 F.3d at 1115. In accordance with this precedent, the District Court held that "[b]ased on Michigan Supreme Court precedent, as interpreted by the Sixth Circuit Court of Appeals, this Court holds that Waeschle states a 42 U.S.C. §1983 cause of action under the Fourteenth Amendment Due Process Clause." *Waeschle v. Dragovic*, 2008 U.S. Dist. LEXIS 73103 at *14. Like the present matter, *Whaley* did not deal with the

entire body, but with the return of one of the parts (in *Whaley,* the eyes.)

Petitioner's claim was not about the state's police power right to conduct an autopsy and not about the state's right to remove her mother's organs for examination during that procedure. Those state interests admittedly take precedence over the petitioner's interest in her mother's remains. The basis of petitioner's claim is that after Katherine Weins's brain was no longer needed for examination, petitioner had a right to direct its disposition. Specifically, petitioner was entitled to notice that her mother's brain was retained for examination and an opportunity to direct the disposition of all of her mother's remains in accordance with her personal and religious beliefs. No such notice or opportunity was provided. Instead, petitioner was never advised that the remains released to her did not include her mother's brain and was never allowed to make a decision as to the disposition of all of her mother's remains after the autopsy was completed. As the District Court explained in its September 19, 2008 Order, "[t]he issue in this case is whether Waeschle has a property interest in Weins's brain – protected by the United States Constitution – such that she was entitled to notice that Weins's brain was not included with her other remains."

2. The Decision of the District Court

Defendants moved to dismiss pursuant to Civ. R. 12(b)(6) and for summary judgment pursuant to Civ. R. 56. The basis for defendants' motion to dismiss was that petitioner had failed to state a claim on the issue of the existence of a constitutionally protected right and, as to the state law claims of intentional and

negligent infliction of emotional distress, on the basis of governmental immunity. Defendants also sought summary judgment claiming that there was no genuine issue of material fact that defendants were immune. Defendants also asked the trial court to certify a question to the Michigan Supreme Court concerning the property interest Michigan recognizes in the remains of a deceased loved one.

The District Court concluded that "Waeschle has a federally protected constitutional right to her mother's body parts, grounded in the Fourteenth Amendment Due Process Clause." *Waeschle v. Dragovic*, 2008 U.S. Dist. LEXIS 73103 at *3. The court also concluded that "[t]hat right is clearly established." *Id.* The District Court granted defendants' motion to dismiss the state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress.

The District Court found no need to certify any question to the Michigan Supreme Court. In this regard, the District Court concluded that "[t]his Court finds no question that Michigan law may resolve is presented here. The property right is sufficiently established, and whether that right rises to the level of a "legitimate claim of entitlement," protected by the Due Process Clause of the Fourteenth Amendment, is a matter of federal law." *Id* at *18. The District Court adhered to the binding precedent of *Whaley* and *Brotherton* which clearly established the "Federal right."

3. The Decision of the Sixth Circuit

On appeal the Sixth Circuit panel reversed the denial of summary judgment as to petitioner's claims against the medical examiner in his individual-capacity. *Waeschle v. Dragovic*, 576 F.3d 539, 551 (6th Cir. 2009). This Sixth Circuit panel concluded that a Michigan state court might conclude that Michigan does not grant property rights in the remains of the next of kin. While the panel seemed to be trying to avoid Circuit's precedent by claiming this case was "distinguishable" as involving a "legitimate forensic study" it ignored the fact that the body parts taken in *Brotherton* and *Whaley* were likewise taken during "legitimate forensic studies." Rather, the panel used a troubling process which invited the state supreme court to weigh-in with its agreement or disagreement with Circuit precedent. That might be unremarkable if the state court were being asked to conclude state law matters as the underpinning of federal rights for FUTURE cases. Instead, the panel sought to allow the state court to make a pronouncement for the purpose of retroactively overturning vested federal rights. This panel's fiat clearly violated the Sixth Circuit's own internal operating procedure. (6th Cir. I.O.P. 26 which provides that one panel may not unilaterally overrule a prior panel's ruling.)[1]

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[1] 6 Cir. I.O.P. 206:

(c) Published Opinion Binding

Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court. (Dec. 1, 1998)

This Sixth Circuit panel thus abdicated its most important function by announcing that it 'would not reach' the issue of whether there was a federally protected constitutional right.[2]

The Sixth Circuit panel directed the District Court to certify the following question to the Michigan Supreme Court

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

But as the District Court concluded, and as the Sixth Circuit itself held previously in *Whaley,* there is no question but that under Michigan law the property right is sufficiently established. That was announced as "circuit precedent" in two prior cases and it binds the conduct of persons in that Circuit, and is not subject to retroactive overruling by a state court. Remember, the conduct at issue in the instant case all occurred under *Whaley* as the law of the circuit. It was therefore improper for the Sixth Circuit to certify this question to the Michigan Supreme Court.

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[2] The court noted that "[o]ur qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established." *Waeschle v. Dragovic*, 576 F.3d at 544.

Petitioner timely requested a rehearing *en banc* of the basis that the panel's decision conflicted with the binding precedent of the Sixth Circuit as articulated in *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs*, and *Brotherton v. Cleveland*. On October 23, 2009 the Sixth Circuit denied petitioner's petition for rehearing. *Waeschle v. Dragovic*, Case No. 08-2228, 2009 U.S. App. LEXIS 23708 (6th Cir. Oct. 23, 2009).

Reasons for Granting the Petition

1. Where it has previously been decided as the law of the Circuit that certain conduct is a violation of the federal Constitution, fundamental principles of federalism prevent a federal court from certifying a question to abdicate to the state supreme court for a possible determination to the contrary effectively inviting a State to overrule a Federal Court's Constitutional decision

This Court has noted that through the certification of dispositive questions of state law to a state supreme court "a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'" *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997). Cases where certification may be appropriate include those such as *Arizonans for Official English*, where the issue was the interpretation of the Arizona Constitution. Similarly, certification may be appropriate where the construction of particular state statutes is at issue; e.g. *Bellotti v. Baird*, 428 U.S. 132, 146-148 (1976), where this Court noted that construction by the state court is appropriate "where an unconstrued state statute is susceptible of a construction by the state judiciary

'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.'" But neither situation is presented in this case. This case does not involve the interpretation or construction of a particular state statute or state constitutional provision. This case involves the evaluation of rules and understandings—a *bundle* of rights—in the context of the Fourteenth Amendment. So, in this case the fundamental principles of federalism cut the other way, and preclude certification.

In this case the Sixth Circuit has already determined that the conduct complained of by petitioner is a violation of the federal constitution. That determination is the law of the Sixth Circuit and, if federalism and precedent have any meaning, it is federal law which must be followed by those within the Circuit. In *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs* the Sixth Circuit examined Michigan law and determined that the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. In reaching that conclusion the Sixth Circuit specifically held that "Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative." *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs*, 58 F.3d at 1116.

The *Whaley* court noted, citing this Court's decision in *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972) that "[t]he existence of a property interest for due process purposes depends in large part on state law." 58 F.3d at 1113-1114. The *Whaley* court also noted, however, citing *Perry v. Sindermann*, 408 U.S. 593, 602 (1972) that "'property' interests subject to

procedural due process are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Id.* Finally, the *Whaley* court explained that "whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law," and noted that "[i]n making this determination, courts must look beyond the law's nomenclature and to its substance." *Id.*

The *Whaley* court's conclusion was thus the result of a two step analysis: 1) is there a property interest; and 2) does the interest rise to the level of a constitutionally protected interest. Notwithstanding the potential advantages that certification of state law questions may present in some cases, it was perfectly appropriate for the Sixth Circuit in *Whaley* to make its own determination of Michigan law. As this Court noted in *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940) "it is the duty of the [federal court] in every case to ascertain from all the available data what the state law is and apply it * * * ." Similarly, in *Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944) this Court noted that "[i]t is the duty of the federal appellate courts, as well as the trial court, to ascertain and apply the state law where, as in this case, it controls decision." In *Salve Regina College v. Russell*, 499 U.S. 225, 239 (1991), this court observed that "[t]he common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified" and that "the very essence of the Erie doctrine is that the bases of state law are presumed to be communicable by the parties to a federal judge no less than to a state judge." And as this Court explained in *Kuhn v. Fairmont Coal*

Co., 215 U.S. 349, 359 (1910), "[t]he Federal courts have an independent jurisdiction in the administration of state laws, coordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws." See also, by way of analogy, *Howlett v. Rose*, 496 U.S. 356, 366, n. 14 (1990) where this Court noted that "we have long held that this Court has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid nonfederal ground and whether that ground finds 'fair or substantial support' in state law."

Not only was it permissible for the Sixth Circuit to make the determination of Michigan law in *Whaley*, it was particularly appropriate for the Sixth Circuit to ascertain the contours of Michigan law in that case because the federal constitutional question of whether there was a constitutionally protected property interest in *Whaley* did not involve the construction of a particular state statute or a particular constitutional provision but instead focused on the "substantive nature of the interest created by the state."

As this court noted in *United States v. Craft*, 535 U.S. 274, 278 (2002), property in the constitutional sense is often thought of as "a 'bundle of sticks' – a collection of individual rights which, in certain combinations, constitute property." In evaluating this "bundle," as the *Whaley* court properly noted, "'property' interests subject to procedural due process are not limited by a few rigid, technical forms" and "courts must look beyond the law's nomenclature and to its substance." Thus, properly conducted, this determination, involves the evaluation of "a broad

range of interests that are secured by 'existing rules or understandings.'"

Although the property interest may "depend[] in large part on state law," as this Court noted in *Board of Regents v. Roth, supra*, there may well be a marked difference between what the states consider to be property, compared to what is "property" protected by the federal Constitution. This court in *United States v. Craft, supra*, recognized this distinction when it explained that

> In looking to state law, we must be careful to consider the substance of the rights state law provides, not merely the labels the State gives these rights or the conclusions it draws from them. Such state law labels are irrelevant to the federal question of which bundles of rights constitute property * * * . (Emphasis added.)

For purposes of determining the question of whether an interest is "property" for purposes of federal constitutional law, therefore, it is appropriate for the *federal* court to conduct this analysis of the substantive nature of the interest created by the state. This analysis does not involve the construction of unconstrued state statutes or constitutions but rather requires the evaluation of the substance of the existing rules and understandings. Since this Court has instructed that "state law labels are irrelevant to the federal question of which bundles of rights constitute property" and that the federal court must be careful of not focusing on the labels the states give these rights or the conclusions the states draw from them, the federal court is the main forum to objectively make this evaluation.

This is particularly true in this case, where the Sixth Circuit has already made that evaluation of Michigan law, and concluded that under Michigan law there is a property interest in the remains of a deceased loved protected by the Fourteenth Amendment. For the Sixth Circuit to now direct the District court to certify a question to the Michigan Supreme Court is to give the Michigan Supreme Court the opportunity to overrule the law of the Sixth Circuit.[3] Such an approach seriously violates the fundamental principles of federalism.

Federalism is often viewed from the perspective of the states—"there is a 'special deference owed to state law and state courts in our system of federalism, * * *.'" *Thomas v. Am. Home Prods.*, 519 U.S. 913, 917 (1996), Rehnquist, C.J., dissenting. But, as the court recognized in *Ark. Chronicle v. Easley*, 321 F. Supp. 2d 776, 790-791 (E.D. Va., 2004) rev'd on other grounds, *Ark. Chronicle v. Murphy*, 183 Fed. Appx. 300 (4th Cir., 2006), "federalism is a two-way street founded upon mutual respect between federal and state courts."

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[3] Lest this appear to be mere speculation, this has in fact happened in *Albrecht v. Treon*, 118 Ohio St. 3d 348, 358 (2008), where, on a question certified to it by the District court for the Southern District of Ohio, the Ohio Supreme Court concluded that "nothing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio." This conclusion effectively overruled the Sixth Circuit's holding in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

As Justice Kennedy explained in his concurring opinion in *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995)

> Federalism was our Nation's own discovery. The Framers split the atom of sovereignty. It was the genius of their idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other. (Emphasis added.)

It is the "each protected from incursion by the other" aspect which is operative here, because with regard to federal rights, as noted by this Court in *Dennis v. Higgins*, 498 U.S. 439, 450 (1991), the Supremacy Clause "'secure[s]' federal rights by according them priority whenever they come in conflict with state law.'" In *Howlett v. Rose*, 496 U.S. at 371 this Court explained that "the Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source." The Supremacy clause, as the court in *Legal Environmental Assistance Found. v. Pegues*, 904 F.2d 640, 643-644 (11th Cir. 1990) noted, "states a fundamental structural principle of federalism."

The Sixth Circuit's directive to certify the question to the Michigan Supreme Court in a way that opened the door for the Michigan Supreme Court to overrule the Sixth Circuit's decision in *Whaley,* violates this fundamental structural principle of federalism. It does so because it invites the Michigan Supreme court to "dissociate themselves from federal law" and make its own determination about whether Michigan state agencies are complying with federal law, a

determination that is ultimately vested in the federal courts. The invitation to a state court to decide if the agencies of its own state are in compliance with *federal* law—against prior federal Circuit decisions clearly holding they are not—is not the way our system works.

It is clearly the province of federal courts decide federal law. As this Court long ago held in *Marbury v. Madison*, 5 U.S. 137, 177 (1803), "[i]t is emphatically the province and duty of the judicial department to say what the law is." See also, *FMC v. Shoshone-Bannock Tribes*, 905 F.2d 1311, 1314 (9th Cir. 1990) ("federal courts are the final arbiters of federal law"); *Blount v. Sterling Healthcare Group*, 934 F. Supp. 1365, 1374 (S.D. Fla. 1996) ("it is the job of federal courts to be the 'final arbiter(s) of federal law, a role which cannot be usurped by the state courts'"). And of course, among federal courts, this Court is the ultimate final arbiter of federal law. *Danforth v. Minnesota*, 552 U.S. 264 (2008), Roberts. C.J., dissenting; *Dennis v. Mitchell*, 68 F. Supp. 2d 863, 876 (N.D. Ohio 1999) ("[t]he Supreme Court alone is the final arbiter of the inevitable conflicts that arise when these two court systems construe the same law").

With respect to the issue at hand, the court in *Abbeville Gen. Hosp. v. Ramsey*, 3 F.3d 797, 804 (5th Cir. 1993) explained that "general principles of federalism, * * * do not permit states to be final arbiters of their compliance with federal law." This Court reached a similar conclusion in *Howlett v. Rose*, 496 U.S. at 366 when it observed that a state court's construction of immunity "raise[d] the concern that the state court may be evading federal law and discriminating against federal causes of action."

What is happening in this case? The panel sought to allow the state to overcome a federal constitutional violation by announcing that the right at issue never existed. But as Justice Stevens more pointedly put it in his concurring opinion in *Hughes v. Washington*, 389 U.S. 290, 295-297 (1967) "a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." That is exactly what the Sixth Circuit has invited the Michigan Supreme court to do.[4]

Does a Michigan court have the right to declare that state law does not in fact afford a protected interest in the remains of loved ones? Certainly. The state has the right to determine what is property and what is not. But may its holding apply so as to retroactively overturn federal precedent which articulated federal constitutional rights in the same context? Certainly not. When a federal court exercises its right to determine state law, does so, and then determines a federal law question on that basis and announces federal rights and duties, that rule of law stands, and must be followed. A subsequent decision finding the state right to be different, or even not to exist at all, allows a reexamination of the federal right which springs from it as to future players. It does not change the rules for those who already ran the race under the extant rule announced by the Circuit.

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[4] And, in fact, it is exactly what the Ohio Supreme Court did in fact do in *Albrecht v. Treon*, supra, when it concluded that "nothing in the United States Constitution, the Ohio Constitution, Ohio statutes, or common law establish a protected right in autopsy specimens in Ohio."

Here, the Sixth Circuit made a state law determination that Michigan law recognized a property interest in next of kin to the remains of loved ones. The Circuit then made a federal, constitutional determination that this right rose to the level of a "legitimate claim of entitlement" protected by the due process clause. That was the federal law of the Sixth Circuit, and was the law of the Sixth Circuit at the time petitioner's rights were violated.

In this subsequent case, fourteen years after *Whaley,* the Sixth Circuit panel has done nothing less than present the Michigan Supreme Court with the opportunity to retroactively insulate its medical examiners from liability for violating a right which the Sixth Circuit determined to be Constitutionally protected. The panel may not do so, because such a result would be contrary to the fundamental structure and principles of federalism. Accordingly, this Court should grant petitioner's petition for a Writ of Certiorari.

2. While a state supreme court can prospectively change its interpretation and application of state law, which may prospectively change the analysis of a federal constitutional question dealing with due process and property rights, fundamental principles of Federalism prevent a state court change of law from retroactively eliminating vested federal Constitutional rights.

Simply put, a state court may not retroactively overrule a federal court. See, e.g. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 750-751 (1995) (holding that the Ohio Supreme Court violated the Supremacy

Clause when it decided not to retroactively apply this Court's decision that an Ohio tolling provision violated the commerce clause). The concept of federalism does not limit a state court from making determinations of its own state laws, or even of federal laws properly within its jurisdiction. It does prevent the state court, however, from making a pronouncement which would interfere with, undermine, or eliminate an accrued cause of action under a decision of federal law, even when that federal decision is predicated on underlying state rights.

The determination by the *Whaley* court that the next of kin of a deceased loved one in Michigan had of a "legitimate claim of entitlement" protected by the due process clause was the law which governed the defendants' conduct during the time period relevant to petitioner's action. The effect of the *Whaley* holding was two-fold: it gave the petitioner existing rights to certain federal procedural protections and it placed an obligation on the defendants not to violate those rights. With regard to the conduct of defendants in this case, *Whaley* "clearly established" that family members have an interest in the remains of their loved ones which is protected by the United States Constitution. Thus, defendants were prohibited from denying petitioner her rights without appropriate due process. *Whaley* was the law of the Circuit at the time defendants committed the acts complained of in this action. Defendants were not at liberty to ignore their obligations to petitioner under *Whaley* in the hope that the Michigan Supreme Court would eventually change the law.

The purpose of law is to create an ordered and predictable society and relationship between peoples.

Predictability and order are lost if there is an ability to change the rules after the game is over. Put another way, where a rule of law is made public for people to know and follow, it is expected that they will do so even if that rule of law may possibly be subject to change, or even complete repeal, at some future time. To allow the public, or in this case the state, to disregard announced rules of law and court decisions simply because they may change in the future would result in anarchy.[5] Defendants' conduct for the period relevant to this action was governed by *Whaley* and that conduct violated petitioner's existing and clearly established rights.

This issue does not involve the general federal rule of retroactivity as set forth by this Court in *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993) ("[w]hen this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule"). Any decision by the Michigan Supreme Court would neither be a decision by a federal court, let alone by "this Court," nor would it be an interpretation of federal law, let alone a controlling interpretation of federal law.

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[5] A key exception to this rule is where a subsequent decision declares that the existing rule of law was unconstitutional. In that circumstance, the determination of unconstitutionality is retroactive because an unconstitutional law is not a bad law. It never was the law. This exception is not raised by the present matter because there has been no determination of unconstitutionality here.

This issue does not even involve Michigan's rules regarding the prospective or retrospective application of its decisions; though the Michigan Supreme Court has held that "[a]lthough the general rule is that judicial decisions are given full retroactive effect, a more flexible approach is warranted where injustice might result from full retroactivity." *Pohutski v. City of Allen Park*, 465 Mich. 675, 696 (2002) (citation omitted). As this Court observed in *Bouie v. Columbia*, 378 U.S. 347, 354 (1964), "a federal right turns upon the status of state law as of a given moment in the past – or, more exactly, the appearance to the individual of the status of state law as of that moment." The issue is thus not the prospective or retrospective application of any decision as to Michigan law which the Michigan Supreme Court might render, it is rather whether such a decision can change the status of state law as of a given moment in the past. Under the facts of this case, that is an issue of federalism.

The Sixth Circuit in *Whaley* made a determination of what the "rules and understandings" were in Michigan with regard to the next of kin's interest in the remains of their deceased loved ones. As discussed in the previous section, it was particularly appropriate for the *federal* court to make this determination since it did not involve the interpretation of a particular state statute or state constitutional provision but rather the evaluation of a "bundle" of rights in the light of federal law. And in the evaluation of that bundle in light of federal law the labels and conclusions of the state courts with regard to those rights are irrelevant. *United States v. Craft*, supra.

Once *Whaley* was decided it became the law of the Sixth Circuit, and was the law of the Sixth Circuit at the time that defendants retained and destroyed Katherine Weins's brain. *Whaley* articulated what Michigan law was in the Sixth Circuit for federal due process purposes at a particular point of time in the past—the point in time when petitioner's cause of action accrued. The Michigan Supreme Court simply cannot now overrule the Sixth Circuit with regard to the Sixth Circuit's determination of what the status of state law as of a given moment in the past was, and thereby extinguish an accrued cause of action.

In *Richards v. Jefferson County*, 517 U.S. 793, 804 (1996), citing *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-682 (1930) this court explained that "[w]hether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it." And under *Whaley* petitioner had a right. In *Bouie v. Columbia,* supra, this Court noted that "[w]hen a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law 'in its primary sense of an opportunity to be heard and to defend [his] substantive right.'"

Allowing the Michigan Supreme Court the opportunity to determine not just what the law *is* in Michigan with regard to the rights of the next of kin in the remains of their deceased loved ones but what the law *was* at a point of time in the past, a point in time when the Sixth Circuit had already determined that

the next of kin in Michigan had an interest protected by the Fourteenth Amendment, would have the same result. Such a determination deprives petitioner of her right to defend her substantive freedoms as articulated by the Sixth Circuit. And that result would offend the fundamental structure and principles of federalism.

Further, any analysis by the Michigan Supreme Court would necessarily be colored by not only the Sixth Circuit's decision in *Whaley* but also by the District Court's original decision in this case with regard to potentially all Michigan medical examiners. As discussed in the preceding section, certification to the Michigan Supreme Court would allow the Michigan Supreme Court to go back in time and overrule Sixth Circuit precedent, thereby allowing the Michigan Supreme Court, rather than the federal courts, to determine Michigan's compliance with federal law. That result, too, would offend the fundamental structure and principles of federalism.

This panel's legal maneuver completely undercuts the jurisdiction and power of the Federal courts. The Constitution never envisioned the State courts to have the power to overrule the Federal Courts. (**McCulloch v. Maryland**, 17 U.S. (4 Wheat.) 316, 414-15, 417, 420 (1819).

This case involves thousands of autopsied victims and families and whether the government can "take" away one's basic human right to bury our loved ones as desired.

Accordingly, this Court should grant petitioner's petition for a Writ of Certiorari.

Conclusion

For the reasons set forth herein, petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed August 14, 2009]

KAREN WAESCHLE, individually and on behalf of others similarly situated, *Plaintiff-Appellee*,	)
v.	)
LJUBISA J. DRAGOVIC, individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation, *Defendants-Appellants*.	)

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 08-10393—Victoria A. Roberts, District Judge.

Argued: June 16, 2009

Decided and Filed: August 14, 2009

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.*

COUNSEL

ARGUED: William H. Horton, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellants. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, for Amici Curiae. **ON BRIEF:** William H. Horton, Elizabeth A. Favaro, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, Keith J. Lerminiaux, OAKLAND COUNTY CORPORATION COUNSEL, Pontiac, Michigan, for Appellants. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, John Henry Metz, LAW OFFICE, Cincinnati, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Daniel A. Ophoff, KENT COUNTY, Grand Rapids, Michigan, Joanne G. Swanson, KERR, RUSSELL AND WEBER, PLC, Detroit, Michigan, for Amici Curiae.

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* The Honorable Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

AMENDED OPINION

RONALD LEE GILMAN, Circuit Judge. After Karen Waeschle's mother died, an autopsy was performed to determine the cause of death. When the mother's remains were returned to Waeschle for cremation, she was not informed that the brain had been removed during the autopsy and was still being studied by the Medical Examiner. Waeschle sued Oakland County and Ljubisa J. Dragovic, the Oakland County Medical Examiner (Dragovic or the Medical Examiner), after discovering that her mother's brain had been incinerated as medical waste once the autopsy was completed. The Medical Examiner, Waeschle maintains, violated the Due Process Clause of the Fourteenth Amendment by depriving her of the right to dispose of her mother's brain.

Oakland County and Dragovic filed for summary judgment, arguing that Waeschle had no constitutionally protected property right to possess her deceased mother's brain because it had been removed for forensic examination. Dragovic also asserted a qualified-immunity defense. In the alternative, the County and Dragovic requested that the district court certify to the Michigan Supreme Court the question of whether Michigan law gives Waeschle a property interest in her deceased mother's brain for the purpose of burial or cremation.

For the reasons set forth below, we **REVERSE** the portion of the district court's judgment denying Dragovic's qualified-immunity defense, and **REMAND**

the case with instructions to grant his motion for summary judgment with respect to Waeschle's individual-capacity claim against him. We also **REVERSE** the judgment of the district court denying Oakland County's and Dragovic's motion to certify the question of state law to the Michigan Supreme Court, and **REMAND** the case with instructions to certify the question and conduct such further proceedings as are necessary for the proper disposition of this case.

I. BACKGROUND

A. Factual background

Karen Waeschle's 88-year old mother, Katherine R. Weins, was a resident of a nursing home in West Bloomfield, Michigan. In August 2006, she fell and hit her head. Weins was taken to a hospital, where she died two weeks later. Waeschle suspected that abuse or neglect caused the fall. To investigate, the West Bloomfield Township Police Department requested that an autopsy be performed on Weins's body. Waeschle did not challenge the request.

Dr. Ruben Ortiz-Reyes was the Deputy Oakland County Medical Examiner who conducted the autopsy. This required Dr. Ortiz-Reyes to remove and examine various organs, including Weins's brain, for clues regarding the cause of her death. To examine a brain, it must be soaked in a formaldehyde-like solution until it becomes stiff enough to dissect. The soaking process normally takes 10 to 14 days. With the exception of the brain, the other organs that Dr. Ortiz-Reyes examined were placed back into the body.

When Weins's body (minus the brain) was made available to Waschle, the latter cremated the remains. Waeschle disposed of her mother's body without knowing that the brain was not included. The Medical Examiner failed to notify Waeschle that her mother's body was being returned without the brain or that the Medical Examiner planned to incinerate it once the examination of that organ was completed.

Several months later, after disposing of her mother's body, Waeschle met with the Deputy Medical Examiner and was provided a copy of the autopsy report. At that time, Waeschle learned that her mother's brain had been incinerated as medical waste without her consent. This litigation followed.

B. Procedural background

As amended, Waeschle's complaint alleged that the Medical Examiner violated Waeschle's Fourteenth Amendment right to due process by not returning her mother's brain for disposal after the autopsy of that organ was completed. Waeschle also claimed that Dragovic negligently and intentionally inflicted emotional distress on her in violation of state law. In June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. He also filed a motion to dismiss the state-law causes of action. In the alternative, Dragovic urged the district court to certify the state-law issues to the Michigan Supreme Court.

The district court dismissed the state-law claims. As for the due process claim, the court found that Waeschle had established that (1) she had a

quasi-property interest in her mother's brain that was protected under the United States Constitution, and (2) the Medical Examiner deprived her of that interest while acting under color of state law. The court also found that Dragovic was not entitled to qualified immunity because the quasi-property interest was "clearly established" and because the Medical Examiner "reasonably should have known" that he was violating Waeschle's Fourteenth Amendment right.

II. ANALYSIS

A. Standard of review

This appeal involves the denial of a qualified-immunity claim, which was set forth in Dragovic's motion for summary judgment. "We review a district court's denial of qualified immunity de novo." *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

B. Section 1983 and the qualified-immunity framework

Section 1983 serves as a vehicle to obtain damages caused by persons acting under color of state law whose conduct violates the U.S. Constitution or federal laws. *McQueen v. Beecher Comty. Schs.*, 433 F.3d 460, 463 (6th Cir. 2006). "A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity." *Drogosch v. Metcalf*, 557 F.3d 372, 377 (6th Cir. 2009). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816 (citations omitted). And

> if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's

> conduct violated a clearly established constitutional right.

Id. (citation omitted).

In *Pearson*, however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that

> [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional right is not clearly established but far from obvious whether in fact there is such a right.

Id.

Our qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established.

C. Clearly established constitutional rights

The "clearly established" prong of the two-step *Saucier* analysis is particularly important for the present case. This court has clarified that

> [f]or a right to be "clearly established," the c ntours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's

> conduct must be apparent in light of pre-existing law.

Durham v. Nu'Man, 97 F.3d 862, 866 (6th Cir. 1996). "A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred." *Id.*

Waeschle complains that Dragovic violated her right to dispose of her mother's brain when he did not give her the opportunity to recover it for the purpose of burial or cremation. But whether Waeschle has this right under state law is far from clear. Before explaining why, we will set forth the framework governing the analysis of procedural due process claims to provide further context for the claim at stake in this appeal.

1. Due process framework

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Profl Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (citation omitted).

This appeal concerns the question of whether Waeschle has a constitutionally protected property interest under the first element listed above. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (internal quotation marks omitted)).

Although property rights are principally created by state law, "whether a substantive interest created by the state rises to the level of a constitutionally protected property interest is a question of federal constitutional law." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. 1995). "Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. The due process clause only protects those interests to which one has a legitimate claim of entitlement." *Brotherton v. City of Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citations and internal quotation marks omitted). In the next subsection, we address the issue of whether Dragovic deprived Waeschle of a clearly established, constitutionally protected property right to her mother's brain without due process of law.

2. *White's claimed property right is not clearly established*

Waeschle cites two cases from this court in support of her claim that she has a clearly established property right to her mother's brain: *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of*

Tuscola, 58 F.3d 1111, 1117 (6th Cir. 1995). Each of these cases involves the removal of corneas from dead bodies without the authorization of the decedent's next of kin. Because the court in *Whaley* considered itself bound by *Brotherton*, we will discuss the cases in chronological order.

In *Brotherton*, the plaintiff's husband was discovered in his car without a pulse. He was taken to a hospital in Cincinnati, Ohio, where he was declared dead on arrival. The plaintiff declined to donate her husband's organs. Because the death might have been a suicide, the hospital transferred the body to the county coroner's office for an autopsy. After the autopsy was completed, the coroner permitted the removal of the decedent's corneas for storage in an eye bank. The hospital had failed to inform the coroner that the plaintiff did not want her husband's body parts removed for donation. Nor did the coroner ask whether there were any such objections before allowing the removal of the corneas. In fact, an Ohio statute "permitted a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body." *Brotherton*, 923 F.2d at 478 (citing Ohio Rev. Code § 2108.60).

The plaintiff in *Brotherton* sued the county coroner under 42 U.S.C. § 1983, alleging that she was deprived of her property rights in violation of the Due Process Clause because her husband's corneas had been removed without her consent. *Id.* at 478-79. Although the district court dismissed the complaint for failing to state a claim, this court reversed, holding that "the

aggregate of rights granted by the state of Ohio to [the plaintiff] rises to the level of a legitimate claim of entitlement in [the decedent's] body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.* at 482 (internal quotation marks omitted).

In reaching this conclusion, the *Brotherton* court impliedly conceded that the widow's rights to her husband's dead body were quite limited. The court acknowledged, for example, that Ohio courts had expressly declined to recognize that the next of kin have vested property rights in the bodies of their deceased relatives. *Id.* at 480 (citing *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35 (Ohio Ct. App. 1986)). On the other hand, the court noted that "property" is traditionally conceptualized as a bundle of rights, including "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.* at 481. Moreover, there was little doubt that Ohio law afforded the next of kin at least some of these rights with respect to their relative's body. *See id.*

The court in *Brotherton* emphasized that the plaintiff had the right under Ohio law to possess her husband's body for the limited purpose of conducting a burial or other lawful disposition. *Id.* at 482. Another right of the next of kin is to make an anatomical gift of their relatives' organs. *See id.* at 478 ("The hospital asked [the plaintiff] to consider making an anatomical gift; she declined . . . ."). *Brotherton* concluded that these limited rights, even though they were not labeled property rights by the Ohio courts, formed the basis of a constitutionally protected property interest in the decedent's body, including the corneas. *Id.*

Whaley involved similar facts. Two Michigan counties hired a pathologist to conduct autopsies on a contractual basis. The counties entered into an agreement pursuant to which the pathologist's assistant was allowed to remove a decedent's corneas without the consent of the next of kin. In return, the pathologist's assistant, who stood to profit from selling the corneas, agreed to bear "all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not." *Whaley*, 58 F.3d at 1113.

Once this cornea-removal practice was discovered, a class of plaintiffs sued the counties, alleging that "they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedents' eyeballs or corneas." *Id.* The district court dismissed their complaint after concluding that Michigan law did not create rights that qualified as constitutionally protected property interests under the Due Process Clause. *Id.*

Just as in *Brotherton*, however, this court reversed the district court's judgment, holding that "the next-of-kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes." *Id.* at 1117. The court reasoned that it was bound by *Brotherton* because Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Id.* at 1114. One such right is that of the next of kin "to possess the body for burial and prevent its mutilation." *Id.* This right was inferred from several Michigan Supreme Court cases recognizing a cause of action for the unlawful mutilation of a corpse. *See id.* (citing, for example, *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956)

("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body.")) The next of kin also have the right to choose whether to make "a gift of all or part of the decedent's body, at least when there is no contrary intent evidenced by the decedent." *Whaley*, 58 F.3d at 1116. In sum, the court concluded that

> the next of kin have the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation. Applying *Brotherton*, we therefore hold that Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative.

Id.

Waeschle contends that the same basic reasoning found in *Brotherton* and *Whaley* controls this appeal. Her argument is, in essence, that her mother's brain is no less constitutionally protected than are eyes or corneas. She also contends that the cornea cases serve to satisfy the second prong of *Saucier*'s qualified-immunity analysis because they allegedly demonstrate that the right to her mother's brain was clearly established.

Brotherton and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in

Brotherton and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

A pair of cases decided in the Southern District of Ohio on this very issue illustrate the conflicting viewpoints. The first case, *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704, at *4-5 (S.D. Ohio Sept. 28, 2005), supports Waeschle's position. In *Hainey*, the plaintiffs brought a class-action lawsuit after learning, as Waeschle did, that they had buried their loved ones' bodies without the brains because the latter had been removed during autopsy and retained for further study. The Ohio coroner moved for, and the district court denied, summary judgment on the basis of qualified immunity.

According to the district court in *Hainey*, the plaintiffs had a legitimate claim of entitlement to the decedents' brains in light of *Brotherton*. *Brotherton*'s holding, the court continued, broadly included "the right to take possession of what remains of the deceased's body following the completion of the autopsy." *Hainey*, 2005 WL 2397704, at *6. The court further concluded that "*Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment." *Id.* at *8. This purportedly clear ruling, furthermore, rendered the coroner ineligible for qualified immunity because "a reasonable coroner in this judicial circuit would have known that disposing of body parts without notice to the decedent's next of kin would have violated that right." *Id.*

Hainey therefore supports Waeschle's claim. But subsequent caselaw in Ohio reaches the opposite conclusion. The same district court, in *Albrecht v. Treon*, No. 1:06-cv-274, 2007 WL 777864, at *1 (S.D. Ohio March 12, 2007) (*Albrecht I*), considered a virtually identical fact pattern as the one addressed in *Hainey*. A lawsuit was filed against the coroner of Clermont County, Ohio after the plaintiffs discovered that the coroner "had removed their son's brain for forensic examination and retained it after the autopsy." *Albrecht I*, 2007 WL 777864, at *1. In response, the coroner argued that the court in *Hainey* had misinterpreted applicable Ohio law. *Id.* The coroner requested that the district court certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at *2.

Acknowledging that Ohio law affords the next of kin a custodial right in the body of the decedent, the district court nevertheless concluded that the right does not "automatically confer to the next of kin a protected right in 'body parts' of a decedent removed and retained by the coroner for forensic examination and testing." *Id.* at *5. The court emphasized that an Ohio statute appeared to severely restrict the rights of the next of kin to body parts or tissues collected during the course of an autopsy. *Id.* (citing Ohio Rev. Code § 313.123(B)(1) (2006) , which provides that "retained

tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws").

Indeed, there was only one exception to this medical-waste disposal requirement, triggered by religious considerations. *Id.* (citing Ohio Rev. Code § 313.123(B)(2), which states that the coroner must return specimens to the person who has the right to the disposition of the body if "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs."). Despite this statute's provision stating that autopsy specimens are to be treated as medical waste, the district court granted the coroner's request to certify the issue to the Ohio Supreme Court after concluding that none of the existing Ohio authorities resolved the precise issue of whether the next of kin had a right to dispose of body parts that had been collected during an autopsy. *Albrecht I*, 2007 WL 777864, at *5–6.

The Ohio Supreme Court accepted the certified question for review and repudiated the plaintiffs' position, holding that "the next of kin of a decedent upon whom an autopsy has been performed *do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing.*" *Albrecht v. Treon*, 889 N.E.2d 120, 122 (Ohio 2008) (*Albrecht II*) (emphasis added). In reaching this conclusion, the court distinguished *Brotherton*, reasoning that "*Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case." *Id.* at 124. The corneas in *Brotherton* were

extracted pursuant to an Ohio statute that permitted their removal even when doing so was not necessary to conduct a forensic examination. 923 F.2d at 478-79. Different interests are at stake, according to the Ohio Supreme Court, when tissue is taken for lawful investigative purposes:

> [A] deceased's next of kin *had no protected right in autopsy specimens pursuant to Ohio statutes*. The Ohio Revised Code authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary. A coroner's forensic examination is a classic function of the police power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time.

Albrecht II, 889 N.E.2d at 126-27 (citation omitted) (emphasis added).

Furthermore, the Ohio Supreme Court noted that its conclusion did not depend on the existence of the 2006 statute that designated autopsy specimens as medical waste. *Id.* at 126 (holding that "[e]ven before [Ohio Rev. Code § 313.123(B)] was enacted, a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes"). *Albrecht II* clearly raises a question as to the scope of the quasi-property right at issue in both *Brotherton* and *Whaley* where forensic specimens are collected in the course of criminal investigations (as in the present case).

Waeschle's property rights, of course, are not defined by Ohio law. But *Whaley* observed that Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Whaley*, 58 F.3d at 1115. The Ohio Supreme Court's decision in *Albrecht II* is therefore relevant in assessing whether the same right is clearly established under Michigan law. And the Court's decision in *Albrecht II*, which explicitly denied that the next of kin have a right to body parts collected for forensic examination, suggests that such a right would probably not be recognized under existing Michigan law.

But our analysis is not based exclusively on the analogy to cases construing Ohio law. Instead, our independent review of Michigan law fails to establish an unequivocal post-autopsy right to specimens taken for the purpose of a lawful criminal investigation. One of the cases from the Michigan Supreme Court cited by Waeschle recognizes a cause of action for the unlawful and intentional mutilation of dead bodies. *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body."). Another recognizes the next of kin's right to control a relative's body for the limited purpose of securing a burial. *Doxtator v. Chicago & W.M. Ry. Co.*, 79 N.W. 922, 922 (Mich. 1899) (recognizing that, although there was "no property in a dead body [at common law], . . . the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere

with that right by withholding the body or mutilating it in any way").

But these cases, as well as others cited by Waeschle, fail to address the question of body parts retained for forensic examination. *See Keyes v. Konkel*,78 N.W. 649, 649 (Mich. 1899) (observing that various state courts have considered dead bodies to be "quasi property," and recognizing a tort for infringing on a next of kin's right to have an unmutilated dead body delivered for burial); *Dampier v. Grace Hosp. Corp.*, 592 N.W.2d 809 (Mich. Ct. App. 1999) (addressing causes of action available against coroners who allowed the decomposition of a dead body in their possession); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) ("While there is no property right in the next of kin to a dead body, . . . Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body . . . ."). None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

Nor does Waeschle identify any Michigan statute that unambiguously sets forth a Medical Examiner's duties regarding how he or she should dispose of particular body parts collected for the purposes of an autopsy. One statute authorizes Medical Examiners to retain, "as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime." Mich. Comp. Laws § 52.205 (emphasis added). The same statute instructs Medical Examiners to "promptly deliver or return *the body* to relatives or representatives of the

deceased." *Id.* (emphasis added). Another statute cited by Waeschle simply describes the right of the next of kin to make decisions regarding, for example, funeral arrangements. *See id.* § 700.3206(1).

Waeschle argues that the above provisions create the right to a prompt return of her mother's brain after the Medical Examiner had completed the autopsy. But the statutory language does not specify whether each and every body part or specimen collected during the course of an autopsy must be returned to the next of kin on a piecemeal basis. Such a requirement might prove totally impracticable.

In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal. Not a single case instructed Dragovic to treat the brain in any manner other than the way he did. Nor did any Michigan statute unambiguously instruct Dragovic on how to dispose of individual body parts retained for forensic examination as opposed to dealing with the body as a whole.

Waeschle's alleged constitutionally protected property right to her mother's brain is therefore not clearly established because the underlying state-created property interest is not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Drogosch v. Metcalf*, 557 F.3d 372, 379 (6th Cir. 2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For that reason, Dragovic is entitled to summary judgment on the basis of qualified immunity. *See Drogosch*, 557 F.3d at 379.

To avoid any misunderstanding, we wish to clarify the limits of this holding. There is nothing in the preceding analysis that is intended to suggest that Michigan law clearly establishes that the next of kin have *no* quasi-property interest in body parts collected during the course of an autopsy for forensic examination. Nor is the discussion meant to foreclose the possibility that, if Michigan establishes such a right in the future, the interest would rise to the level of a constitutionally protected property right under the Fourteenth Amendment. In light of *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), however, we are under no obligation to determine the existence or the scope of Waeschle's right to her mother's brain in the present case.

We also wish to acknowledge that Waeschle's shock in learning that her mother's brain was incinerated as medical waste is understandable. And the possibility exists that Michigan might in the future decide to recognize a right to recover organs that were originally retained as part of a lawful criminal investigation. Such a right would also presumably have to distinguish between major body parts (to which individuals like Waeschle would have a right to possess for the purpose of burial or cremation) and insignificant tissue samples (to which no such right would attach). But Michigan law as presently developed does not clearly recognize that such a custodial right to body parts exists. And whether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualified-immunity test as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).

D. Oakland County and official-capacity claim

Although the preceding qualified-immunity analysis shields Dragovic from Waeschle's individual-capacity claim, we have declined to evaluate the merits of Waeschle's due process claim because we are uncertain as to whether Michigan law gives Waeschle a property interest in her deceased mother's brain that is constitutionally protected. Waeschle's due process claim against Dragovic in his official capacity and against Oakland County is therefore still pending.

We have already explained that the merits of Waeschle's constitutional claim depend primarily on whether, under Michigan law, she had a property interest in her deceased mother's brain. *See Women's Med. Prof'l Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (explaining that the question of whether a constitutionally protected property interest exists is often a question of state law). Specifically, Waeschle's due process claim turns on the answer to the following state-law question:

> Assuming that a decedent's brain has been removed by a medical examiner in order to conduct a lawful investigation into the decedent's cause of death, do the decedent's next-of-kin have a right under Michigan law to possess the brain in order to properly bury or cremate the same after the brain is no longer needed for forensic examination?

Given our view that the Michigan courts are better suited to answer the unsettled state-law aspect of Waeschle's due process claim than we are, we will

exercise our discretion to have the district court certify the above-stated issue to the Michigan Supreme Court. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (explaining that certification to a state's highest court is proper "when the question is new and state law is unsettled") (citations omitted); *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994) (observing that certification is appropriate "where an important question of state law has arisen solely in federal court"); Mich. Ct. R. § 7.305(B)(1) (permitting the Michigan Supreme Court to address questions of Michigan law that have been certified by a federal court).

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the portion of the district court's judgment denying Dragovic's qualified-immunity defense, and **REMAND** the case with instructions to grant his motion for summary judgment with respect to Waeschle's individual-capacity claim against him. We also **REVERSE** the judgment of the district court denying Oakland County's and Dragovic's motion to certify the question of state law to the Michigan Supreme Court, and **REMAND** the case with instructions to certify the question and conduct such further proceedings as are necessary for the proper disposition of this case.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed August 14, 2009]

KAREN WAESCHLE, individually and on behalf of others similarly situated, Plaintiff-Appellee,	)
v.	)
LJUBISA J. DRAGOVIC, individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation, Defendants-Appellants.	)

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.

AMENDED JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX B

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[July 22, 2009]

KAREN WAESCHLE,
Plaintiff-Appellee,

v.

LJUBISA J. DRAGOVIC,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit.
No. 08-10393—Victoria A. Roberts, District Judge.

Argued: June 16, 2009

Decided and Filed: July 22, 2009

Before: GILMAN and McKEAGUE, Circuit Judges; BARRETT, District Judge.*

COUNSEL

ARGUED: William H. Horton, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, for Appellant. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, for Amici Curiae. **ON BRIEF:** William H. Horton, Elizabeth A. Favaro, GIARMARCO, MULLINS & HORTON, P.C., Troy, Michigan, Keith J. Lerminiaux, OAKLAND COUNTY CORPORATION COUNSEL, Pontiac, Michigan, for Appellant. Patrick J. Perotti, DWORKEN BERNSTEIN CO., LPA, Painesville, Ohio, John Henry Metz, LAW OFFICE, Cincinnati, Ohio, for Appellee. Steven M. Jentzen, STEVEN M. JENTZEN, P.C., Ypsilanti, Michigan, B. Eric Restuccia, OFFICE OF THE MICHIGAN ATTORNEY GENERAL, Lansing, Michigan, Daniel A. Ophoff, KENT COUNTY ADMINISTRATORS OFFICE, Grand Rapids, Michigan, Joanne G. Swanson, KERR, RUSSELL AND WEBER, PLC, Detroit, Michigan, for Amici Curiae.

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* The Honorable Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

OPINION

RONALD LEE GILMAN, Circuit Judge. After Karen Waeschle's mother died, an autopsy was performed to determine the cause of death. When the mother's remains were returned to Waeschle for cremation, she was not informed that the brain had been removed during the autopsy and was still being studied by the Medical Examiner. Waeschle sued Ljubisa J. Dragovic, the Oakland County Medical Examiner (Dragovic or the Medical Examiner), after discovering that her mother's brain had been incinerated as medical waste once the autopsy was completed. The Medical Examiner, Waeschle maintains, violated the Due Process Clause of the Fourteenth Amendment by depriving her of the right to dispose of her mother's brain.

Dragovic filed for summary judgment, asserting a qualified-immunity defense, which the district court denied. For the reasons set forth below, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to **GRANT** Dragovic's motion for summary judgment.

I. BACKGROUND

A. Factual background

Karen Waeschle's 88-year old mother, Katherine R. Weins, was a resident of a nursing home in West Bloomfield, Michigan. In August 2006, she fell and hit her head. Weins was taken to a hospital, where she

died two weeks later. Waeschle suspected that abuse or neglect caused the fall. To investigate, the West Bloomfield Township Police Department requested that an autopsy be performed on Weins's body. Waeschle did not challenge the request.

Dr. Ruben Ortiz-Reyes was the Deputy Oakland County Medical Examiner who conducted the autopsy. This required Dr. Ortiz-Reyes to remove and examine various organs, including Weins's brain, for clues regarding the cause of her death. To examine a brain, it must be soaked in a formaldehyde-like solution until it becomes stiff enough to dissect. The soaking process normally takes 10 to 14 days. With the exception of the brain, the other organs that Dr. Ortiz-Reyes examined were placed back into the body.

When Weins's body (minus the brain) was made available to Waschle, the latter cremated the remains. Waeschle disposed of her mother's body without knowing that the brain was not included. The Medical Examiner failed to notify Waeschle that her mother's body was being returned without the brain or that the Medical Examiner planned to incinerate it once the examination of that organ was completed.

Several months later, after disposing of her mother's body, Waeschle met with the Deputy Medical Examiner and was provided a copy of the autopsy report. At that time, Waeschle learned that her mother's brain had been incinerated as medical waste without her consent. This litigation followed.

B. Procedural background

As amended, Waeschle's complaint alleged that the Medical Examiner violated Waeschle's Fourteenth Amendment right to due process by not returning her mother's brain for disposal after the autopsy of that organ was completed. Waeschle also claimed that Dragovic negligently and intentionally inflicted emotional distress on her in violation of state law. In June 2008, the Medical Examiner filed a motion for summary judgment on the due process claim based upon the defense of qualified immunity. He also filed a motion to dismiss the state-law causes of action. In the alternative, Dragovic urged the district court to certify the state-law issues to the Michigan Supreme Court.

The district court dismissed the state-law claims. As for the due process claim, the court found that Waeschle had established that (1) she had a quasi-property interest in her mother's brain that was protected under the United States Constitution, and (2) the Medical Examiner deprived her of that interest while acting under color of state law. The court also found that Dragovic was not entitled to qualified immunity because the quasi-property interest was "clearly established" and because the Medical Examiner "reasonably should have known" that he was violating Waeschle's Fourteenth Amendment right.

II. ANALYSIS

A. Standard of review

This appeal involves the denial of a qualified-immunity claim, which was set forth in Dragovic's motion for summary judgment. "We review a district court's denial of qualified immunity de novo." *Blake v. Wright*, 179 F.3d 1003, 1007 (6th Cir. 1999). Summary judgment is proper where no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). In considering a motion for summary judgment, the district court must construe all reasonable inferences in favor of the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The central issue is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251-52 (1986).

B. Section 1983 and the qualified-immunity framework

Section 1983 serves as a vehicle to obtain damages caused by persons acting under color of state law whose conduct violates the U.S. Constitution or federal laws. *McQueen v. Beecher Comty. Schs.*, 433 F.3d 460, 463 (6th Cir. 2006). "A law enforcement officer's key defense to a § 1983 action is encapsulated in the concept of qualified immunity." *Drogosch v. Metcalf*, 557 F.3d 372, 377 (6th Cir. 2009). "The doctrine of qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or

constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (citation and internal quotation marks omitted).

Until recently, federal courts were required to conduct the qualified-immunity analysis using the two-step sequential inquiry set forth in *Saucier v. Katz*, 533 U.S. 194 (2001). The first step required courts to determine "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right." *Pearson*, 129 S. Ct. at 816 (citations omitted). And

> if the plaintiff has satisfied this first step, the court must decide whether the right at issue was "clearly established" at the time of defendant's alleged misconduct. Qualified immunity is applicable unless the official's conduct violated a clearly established constitutional right.

Id. (citation omitted).

In *Pearson*, however, the Supreme Court held that the sequential *Saucier* protocol was no longer mandatory. *Id.* at 818. The Court reasoned that

> [t]he procedure sometimes results in a substantial expenditure of scarce judicial resources on difficult questions that have no effect on the outcome of the case. There are cases in which it is plain that a constitutional

> right is not clearly established but far from obvious whether in fact there is such a right.

Id.

Our qualified-immunity analysis that follows does not resolve the merits of Waeschle's constitutional claim. Doing so is unnecessary because, as will be shown, Waeschle's purported constitutional right is not clearly established.

C. Clearly established constitutional rights

The "clearly established" prong of the two-step *Saucier* analysis is particularly important for the present case. This court has clarified that

> [f]or a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's conduct must be apparent in light of pre-existing law.

Durham v. Nu'Man, 97 F.3d 862, 866 (6th Cir. 1996). "A right is not considered clearly established unless it has been authoritatively decided by the United States Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred." *Id.*

Waeschle complains that Dragovic violated her right to dispose of her mother's brain when he did not give her the opportunity to recover it for the purpose of burial or cremation. But whether Waeschle has this

right under state law is far from clear. Before explaining why, we will set forth the framework governing the analysis of procedural due process claims to provide further context for the claim at stake in this appeal.

1. Due process framework

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. "In order to establish a procedural due process claim, a plaintiff must show that (1) he had a life, liberty, or property interest protected by the Due Process Clause; (2) he was deprived of this protected interest; and (3) the state did not afford him adequate procedural rights prior to depriving him of the property interest." *Women's Med. Profl Corp. v. Baird*, 438 F.3d 595, 611 (6th Cir. 2007) (citation omitted).

This appeal concerns the question of whether Waeschle has a constitutionally protected property interest under the first element listed above. "Property interests are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) (internal quotation marks omitted)).

Although property rights are principally created by state law, "whether a substantive interest created by the state rises to the level of a constitutionally

protected property interest is a question of federal constitutional law." *Whaley v. County of Tuscola*, 58 F.3d 1111, 1114 (6th Cir. 1995). "Property interests protected by the due process clause must be more than abstract desires or attractions to a benefit. The due process clause only protects those interests to which one has a legitimate claim of entitlement." *Brotherton v. City of Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (citations and internal quotation marks omitted). In the next subsection, we address the issue of whether Dragovic deprived Waeschle of a clearly established, constitutionally protected property right to her mother's brain without due process of law.

2. White's claimed property right is not clearly established

Waeschle cites two cases from this court in support of her claim that she has a clearly established property right to her mother's brain: *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991), and *Whaley v. County of Tuscola*, 58 F.3d 1111, 1117 (6th Cir. 1995). Each of these cases involves the removal of corneas from dead bodies without the authorization of the decedent's next of kin. Because the court in *Whaley* considered itself bound by *Brotherton*, we will discuss the cases in chronological order.

In *Brotherton*, the plaintiff's husband was discovered in his car without a pulse. He was taken to a hospital in Cincinnati, Ohio, where he was declared dead on arrival. The plaintiff declined to donate her husband's organs. Because the death might have been a suicide, the hospital transferred the body to the county coroner's office for an autopsy. After the autopsy was completed, the coroner permitted the

removal of the decedent's corneas for storage in an eye bank. The hospital had failed to inform the coroner that the plaintiff did not want her husband's body parts removed for donation. Nor did the coroner ask whether there were any such objections before allowing the removal of the corneas. In fact, an Ohio statute "permitted a coroner to remove the corneas of autopsy subjects without consent, provided that the coroner has no knowledge of an objection by the decedent, the decedent's spouse, or, if there is no spouse, the next of kin, the guardian, or the person authorized to dispose of the body." *Brotherton*, 923 F.2d at 478 (citing Ohio Rev. Code § 2108.60).

The plaintiff in *Brotherton* sued the county coroner under 42 U.S.C. § 1983, alleging that she was deprived of her property rights in violation of the Due Process Clause because her husband's corneas had been removed without her consent. *Id.* at 478-79. Although the district court dismissed the complaint for failing to state a claim, this court reversed, holding that "the aggregate of rights granted by the state of Ohio to [the plaintiff] rises to the level of a legitimate claim of entitlement in [the decedent's] body, including his corneas, protected by the due process clause of the fourteenth amendment." *Id.* at 482 (internal quotation marks omitted).

In reaching this conclusion, the *Brotherton* court impliedly conceded that the widow's rights to her husband's dead body were quite limited. The court acknowledged, for example, that Ohio courts had expressly declined to recognize that the next of kin have vested property rights in the bodies of their deceased relatives. *Id.* at 480 (citing *Carney v. Knollwood Cemetery Ass'n*, 514 N.E.2d 430, 434-35

(Ohio Ct. App. 1986)). On the other hand, the court noted that "property" is traditionally conceptualized as a bundle of rights, including "the rights to possess, to use, to exclude, to profit, and to dispose." *Id.* at 481. Moreover, there was little doubt that Ohio law afforded the next of kin at least some of these rights with respect to their relative's body. *See id.*

The court in *Brotherton* emphasized that the plaintiff had the right under Ohio law to possess her husband's body for the limited purpose of conducting a burial or other lawful disposition. *Id.* at 482. Another right of the next of kin is to make an anatomical gift of their relatives' organs. *See id.* at 478 ("The hospital asked [the plaintiff] to consider making an anatomical gift; she declined . . . ."). *Brotherton* concluded that these limited rights, even though they were not labeled property rights by the Ohio courts, formed the basis of a constitutionally protected property interest in the decedent's body, including the corneas. *Id.*

Whaley involved similar facts. Two Michigan counties hired a pathologist to conduct autopsies on a contractual basis. The counties entered into an agreement pursuant to which the pathologist's assistant was allowed to remove a decedent's corneas without the consent of the next of kin. In return, the pathologist's assistant, who stood to profit from selling the corneas, agreed to bear "all the counties' expenses in performing the autopsies whenever corneas were removed, and half those expenses when they were not." *Whaley*, 58 F.3d at 1113.

Once this cornea-removal practice was discovered, a class of plaintiffs sued the counties, alleging that

"they were deprived of their Fourteenth Amendment right to procedural due process when the alleged state actors removed the decedents' eyeballs or corneas." *Id.* The district court dismissed their complaint after concluding that Michigan law did not create rights that qualified as constitutionally protected property interests under the Due Process Clause. *Id.*

Just as in *Brotherton*, however, this court reversed the district court's judgment, holding that "the next-of-kin [have] a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes." *Id.* at 1117. The court reasoned that it was bound by *Brotherton* because Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Id.* at 1114. One such right is that of the next of kin "to possess the body for burial and prevent its mutilation." *Id.* This right was inferred from several Michigan Supreme Court cases recognizing a cause of action for the unlawful mutilation of a corpse. *See id.* (citing, for example, *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body.")) The next of kin also have the right to choose whether to make "a gift of all or part of the decedent's body, at least when there is no contrary intent evidenced by the decedent." *Whaley*, 58 F.3d at 1116. In sum, the court concluded that

> the next of kin have the right to dispose of the body in limited circumstances, possess the body for burial, and prevent its mutilation. Applying *Brotherton*, we therefore hold that Michigan

> provides the next of kin with a constitutionally protected property interest in the dead body of a relative.

Id.

Waeschle contends that the same basic reasoning found in *Brotherton* and *Whaley* controls this appeal. Her argument is, in essence, that her mother's brain is no less constitutionally protected than are eyes or corneas. She also contends that the cornea cases serve to satisfy the second prong of *Saucier*'s qualified-immunity analysis because they allegedly demonstrate that the right to her mother's brain was clearly established.

Brotherton and *Whaley*, however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever. The distinction is important because Waeschle might have no right under Michigan law to possess, control, or dispose of her mother's brain once it is removed for legitimate forensic study.

A pair of cases decided in the Southern District of Ohio on this very issue illustrate the conflicting viewpoints. The first case, *Hainey v. Parrott*, No. 1:02-CV-733, 2005 WL 2397704, at *4-5 (S.D. Ohio Sept. 28, 2005), supports Waeschle's position. In *Hainey*, the plaintiffs brought a class-action lawsuit after learning, as Waeschle did, that they had buried their loved ones' bodies without the brains because the

latter had been removed during autopsy and retained for further study. The Ohio coroner moved for, and the district court denied, summary judgment on the basis of qualified immunity.

According to the district court in *Hainey*, the plaintiffs had a legitimate claim of entitlement to the decedents' brains in light of *Brotherton*. *Brotherton*'s holding, the court continued, broadly included "the right to take possession of what remains of the deceased's body following the completion of the autopsy." *Hainey*, 2005 WL 2397704, at *6. The court further concluded that "*Brotherton* very broadly and very clearly held that family members have a property interest in their decedent's body parts which is protected by the due process clause of the Fourteenth Amendment." *Id.* at *8. This purportedly clear ruling, furthermore, rendered the coroner ineligible for qualified immunity because "a reasonable coroner in this judicial circuit would have known that disposing of body parts without notice to the decedent's next of kin would have violated that right." *Id.*

Hainey therefore supports Waeschle's claim. But subsequent caselaw in Ohio reaches the opposite conclusion. The same district court, in *Albrecht v. Treon*, No. 1:06cv-274, 2007 WL 777864, at *1 (S.D. Ohio March 12, 2007) (*Albrecht I*), considered a virtually identical fact pattern as the one addressed in *Hainey*. A lawsuit was filed against the coroner of Clermont County, Ohio after the plaintiffs discovered that the coroner "had removed their son's brain for forensic examination and retained it after the autopsy." *Albrecht I*, 2007 WL 777864, at *1. In response, the coroner argued that the court in *Hainey* had misinterpreted applicable Ohio law. *Id.* The

coroner requested that the district court certify the following question to the Ohio Supreme Court:

> Whether the next of kin of a decedent, upon whom an autopsy has been performed, have a property right under Ohio law in the decedent's tissues, organs, blood or other body parts that have been removed and retained by the coroner for forensic examination and testing.

Id. at *2.

Acknowledging that Ohio law affords the next of kin a custodial right in the body of the decedent, the district court nevertheless concluded that the right does not "automatically confer to the next of kin a protected right in 'body parts' of a decedent removed and retained by the coroner for forensic examination and testing." *Id.* at *5. The court emphasized that an Ohio statute appeared to severely restrict the rights of the next of kin to body parts or tissues collected during the course of an autopsy. *Id.* (citing Ohio Rev. Code § 313.123(B)(1) (2006) , which provides that "retained tissues, organs, blood, other bodily fluids, gases, or any other specimens from an autopsy are medical waste and shall be disposed of in accordance with applicable federal and state laws").

Indeed, there was only one exception to this medical-waste disposal requirement, triggered by religious considerations. *Id.* (citing Ohio Rev. Code § 313.123(B)(2), which states that the coroner must return specimens to the person who has the right to the disposition of the body if "the coroner has reason to believe that the autopsy is contrary to the deceased person's religious beliefs."). Despite this statute's

provision stating that autopsy specimens are to be treated as medical waste, the district court granted the coroner's request to certify the issue to the Ohio Supreme Court after concluding that none of the existing Ohio authorities resolved the precise issue of whether the next of kin had a right to dispose of body parts that had been collected during an autopsy. *Albrecht I*, 2007 WL 777864, at *5–6.

The Ohio Supreme Court accepted the certified question for review and repudiated the plaintiffs' position, holding that "the next of kin of a decedent upon whom an autopsy has been performed *do not have a protected right under Ohio law in the decedent's tissues, organs, blood, or other body parts that have been removed and retained by the coroner for forensic examination and testing*." *Albrecht v. Treon*, 889 N.E.2d 120, 122 (Ohio 2008) (*Albrecht II*) (emphasis added). In reaching this conclusion, the court distinguished *Brotherton*, reasoning that "*Brotherton*'s specific holding regarding removal of corneas for purposes unrelated to the autopsy is not relevant in this case." *Id.* at 124. The corneas in *Brotherton* were extracted pursuant to an Ohio statute that permitted their removal even when doing so was not necessary to conduct a forensic examination. 923 F.2d at 478-79. Different interests are at stake, according to the Ohio Supreme Court, when tissue is taken for lawful investigative purposes:

> [A] deceased's next of kin *had no protected right in autopsy specimens pursuant to Ohio statutes*. The Ohio Revised Code authorizes coroners to perform an autopsy when the coroner believes an autopsy is necessary. A coroner's forensic examination is a classic function of the police

> power of the state. Many times, autopsy specimens and the results of the forensic examination are essential evidence in the prosecution of a crime. Sometimes, autopsy specimens must be preserved for long periods of time.

Albrecht II, 889 N.E.2d at 126-27 (citation omitted) (emphasis added).

Furthermore, the Ohio Supreme Court noted that its conclusion did not depend on the existence of the 2006 statute that designated autopsy specimens as medical waste. *Id.* at 126 (holding that "[e]ven before [Ohio Rev. Code § 313.123(B)] was enacted, a deceased's next of kin had no protected right in autopsy specimens pursuant to Ohio statutes"). *Albrecht II* clearly raises a question as to the scope of the quasi-property right at issue in both *Brotherton* and *Whaley* where forensic specimens are collected in the course of criminal investigations (as in the present case).

Waeschle's property rights, of course, are not defined by Ohio law. But *Whaley* observed that Michigan law contained "the same basic rights in a deceased person's body as Ohio." *Whaley*, 58 F.3d at 1115. The Ohio Supreme Court's decision in *Albrecht II* is therefore relevant in assessing whether the same right is clearly established under Michigan law. And the Court's decision in *Albrecht II*, which explicitly denied that the next of kin have a right to body parts collected for forensic examination, suggests that such a right would probably not be recognized under existing Michigan law.

But our analysis is not based exclusively on the analogy to cases construing Ohio law. Instead, our independent review of Michigan law fails to establish an unequivocal post-autopsy right to specimens taken for the purpose of a lawful criminal investigation. One of the cases from the Michigan Supreme Court cited by Waeschle recognizes a cause of action for the unlawful and intentional mutilation of dead bodies. *Deeg v. City of Detroit*, 76 N.W.2d 16, 19 (Mich. 1956) ("It seems to be settled by the great weight of authority that the unlawful and intentional mutilation of a dead body gives rise to a cause of action on behalf of the person or persons entitled to the possession, control, and burial of such body."). Another recognizes the next of kin's right to control a relative's body for the limited purpose of securing a burial. *Doxtator v. Chicago & W.M. Ry. Co.*, 79 N.W. 922, 922 (Mich. 1899) (recognizing that, although there was "no property in a dead body [at common law], . . . the one whose duty it is to care for the body of the deceased is entitled to possession of the body, as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way").

But these cases, as well as others cited by Waeschle, fail to address the question of body parts retained for forensic examination. *See Keyes v. Konkel*,78 N.W. 649, 649 (Mich. 1899) (observing that various state courts have considered dead bodies to be "quasi property," and recognizing a tort for infringing on a next of kin's right to have an unmutilated dead body delivered for burial); *Dampier v. Grace Hosp. Corp.*, 592 N.W.2d 809 (Mich. Ct. App. 1999) (addressing causes of action available against coroners who allowed the decomposition of a dead body in their

possession); *Tillman v. Detroit Receiving Hosp.*, 360 N.W.2d 275, 277 (Mich. Ct. App. 1984) ("While there is no property right in the next of kin to a dead body, . . . Michigan jurisprudence recognizes a common law cause of action on behalf of the person or persons entitled to the possession, control, or burial of a dead body . . . ."). None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

Nor does Waeschle identify any Michigan statute that unambiguously sets forth a Medical Examiner's duties regarding how he or she should dispose of particular body parts collected for the purposes of an autopsy. One statute authorizes Medical Examiners to retain, "as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime." Mich. Comp. Laws § 52.205 (emphasis added). The same statute instructs Medical Examiners to "promptly deliver or return *the body* to relatives or representatives of the deceased." *Id* (emphasis added). Another statute cited by Waeschle simply describes the right of the next of kin to make decisions regarding, for example, funeral arrangements. *See id.* § 700.3206(1).

Waeschle argues that the above provisions create the right to a prompt return of her mother's brain after the Medical Examiner had completed the autopsy. But the statutory language does not specify whether each and every body part or specimen collected during the course of an autopsy must be returned to the next of kin on a piecemeal basis. Such a requirement might prove totally impracticable.

In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal. Not a single case instructed Dragovic to treat the brain in any manner other than the way he did. Nor did any Michigan statute unambiguously instruct Dragovic on how to dispose of individual body parts retained for forensic examination as opposed to dealing with the body as a whole.

Waeschle's alleged constitutionally protected property right to her mother's brain is therefore not clearly established because the underlying state-created property interest is not "sufficiently clear that a reasonable official would understand that what he is doing violates that right." *See Drogosch v. Metcalf*, 557 F.3d 372, 379 (6th Cir. 2009) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). For that reason, Dragovic is entitled to summary judgment on the basis of qualified immunity. *See Drogosch*, 557 F.3d at 379.

To avoid any misunderstanding, we wish to clarify the limits of this holding. There is nothing in the preceding analysis that is intended to suggest that Michigan law clearly establishes that the next of kin have *no* quasi-property interest in body parts collected during the course of an autopsy for forensic examination. Nor is the discussion meant to foreclose the possibility that, if Michigan establishes such a right in the future, the interest would rise to the level of a constitutionally protected property right under the Fourteenth Amendment. In light of *Pearson v. Callahan*, 129 S. Ct. 808, 818 (2009), however, we are under no obligation to determine the existence or the

scope of Waeschle's right to her mother's brain in the present case.

We also wish to acknowledge that Waeschle's shock in learning that her mother's brain was incinerated as medical waste is understandable. And the possibility exists that Michigan might in the future decide to recognize a right to recover organs that were originally retained as part of a lawful criminal investigation. Such a right would also presumably have to distinguish between major body parts (to which individuals like Waeschle would have a right to possess for the purpose of burial or cremation) and insignificant tissue samples (to which no such right would attach). But Michigan law as presently developed does not clearly recognize that such a custodial right to body parts exists. And whether to recognize such a right is a task that the Michigan legislature and courts are better equipped to handle than this court, which is why we are exercising our discretion under *Pearson* to not further explore the first prong of the qualifiedimmunity test as set forth in *Saucier v. Katz*, 533 U.S. 194 (2001).

D. Certification

In addition to raising the qualified-immunity question, Dragovic argues that the district court erroneously declined to certify certain issues of state law to the Michigan Supreme Court. But this issue is moot because Dragovic is entitled to qualified immunity without such certification in light of our determination that Waeschle's alleged right to her mother's brain is not yet clearly established under Michigan law.

III. CONCLUSION

For all of the reasons set forth above, we **REVERSE** the judgment of the district court and **REMAND** the case with instructions to **GRANT** Dragovic's motion for summary judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed July 22, 2009]

KAREN WAESCHLE, Plaintiff - Appellee,	)
v.	)
LJUBISA J. DRAGOVIC, Defendant - Appellant.	)

Before: GILMAN and MCKEAGUE, Circuit Judges; BARRETT, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Eastern District of Michigan at Detroit.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED and the case is REMANDED with instructions to GRANT defendant Ljubisa J. Dragovic's motion for summary judgment.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NUMBER: 08-10393
HONORABLE VICTORIA A. ROBERTS

[Filed September 19, 2008]

KAREN WAESCHLE, individually and on behalf of others similarly situated, Plaintiff(s),	)
v.	)
OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and on behalf of others similarly situated, Defendant(s).	)

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the Court is Defendants' "Motion to Strike Plaintiff's Sur-Reply Brief." (Doc. #58). Defendants ask the Court to strike Plaintiff Karen Waeschle's ("Waeschle") sur-reply because it is not authorized under the local rules or the Court's June 3, 2008 scheduling order. Waeschle agrees that her sur-reply is not authorized, but asks the Court to grant leave to file the sur-reply. Waeschle's request is denied; Defendants' motion is **GRANTED**.

Also before the Court is Defendants' "Motion for Summary Judgment, Certification of a Question of Michigan Law and Dismissal." (Doc. #49). Defendants ask the Court to dismiss Waeschle's Complaint because: (1) Waeschle does not have a constitutionally protected property interest in a deceased relative's body parts; and (2) they are either entitled to governmental immunity on her state law claims, or, her state law claims fail to state a claim upon which relief can be granted.

If the Court finds Waeschle has a constitutionally protected property interest in a deceased relative's body parts, Defendants ask the Court to find they are entitled to qualified immunity because that interest is not clearly established.

In the alternative, Defendants ask the Court to certify this question to the Michigan Supreme Court: Does Waeschle have a constitutionally protected property interest in a deceased relative's body parts that are removed during a lawful autopsy to determine the cause of death?

Oral argument was heard on September 16, 2008.

For the following reasons, Defendants' motion is **GRANTED IN PART AND DENIED IN PART**. The Court finds Waeschle has a federally protected constitutional right to her mother's body parts, grounded in the Fourteenth Amendment Due Process Clause. That right is clearly established. Because this is a federal cause of action, it is not necessary to certify a question to the Michigan Supreme Court.

II. BACKGROUND

Waeschle's mother, Katherine Weins ("Weins"), lived in the Bortz Nursing Home. On August 28, 2006, the nursing home staff discovered Weins lying on the floor in a pool of blood. Weins was transported to the Huron Valley Hospital; the hospital diagnosed her with a closed head injury and scalp laceration.

Weins died on September 7, 2006. Because there was a suspicion that the nursing home staff neglected or abused Weins: (1) the West Bloomfield Township Police Department initiated a criminal investigation; and (2) Dr. Ruben Ortiz-Reyes ("Dr. Ortiz-Reyes"), an Oakland County Deputy Medical Examiner, conducted an autopsy on September 8, 2006 pursuant to Michigan law. *See* MCLA §52.202(1) ("A county medical examiner or deputy county medical examiner shall investigate the cause and manner of death of an individual under each of the following circumstances: (a) The individual dies by violence[;] (b) The individual's death is unexpected").

During Weins's autopsy, Dr. Ortiz-Reyes removed her brain and placed it in formaldehyde for further

studies. According to Dr. Ljubisa J. Dragovic, the Oakland County Medical Examiner, the standard procedure is to retain a deceased person's brain for further studies when the individual suffered a closed head injury and a criminal investigation is pending. That procedure is authorized by Michigan law. *See* MCLA §52.205(5) ("the medical examiner may retain, as long as may be necessary, any portion of the body believed by the medical examiner to be necessary for the detection of any crime"). After a forensic examination, Defendants say Weins's brain was disposed of as medical waste.

Waeschle discovered Weins was cremated without her brain after she read the autopsy report. Her Complaint against Defendants alleges: (1) Defendants violated her Fourteenth Amendment due process rights by depriving her of Weins's brain without prior notice; (2) negligent infliction of emotional distress; and (3) intentional infliction of emotional distress. Waeschle does not contest the medical examiner's authority to remove the brain for forensic examination.

III. STANDARD OF REVIEW

Waeschle's Fourteenth Amendment due process claim is reviewed under the summary judgment standard. Her state law claims are reviewed under Fed. R. Civ. P. 12(b)(6).

Fed. R. Civ. P. 56(c) provides that summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of

law." In reviewing a motion for summary judgment, "the evidence as well as all inferences drawn therefrom must be read in a light most favorable to the party opposing the motion." *Kochins v. Linden-Alimak, Inc.*, 799 F.2d 1128, 1133 (6th Cir. 1986).

The movant has the initial burden to demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). If the movant meets this burden, the nonmoving party must, by affidavit or otherwise as provided by Rule 56, "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The essential inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Id.* at 251-52. If the nonmoving party does not respond with specific facts showing a genuine issue for trial, summary judgment is appropriate. *Emmons v. McLaughlin*, 874 F.2d 351, 353 (6th Cir. 1989).

When reviewing a motion under Fed. R. Civ. P. 12(b)(6), the trial court "must construe the complaint liberally in the plaintiff's favor and accept as true all factual allegations and permissible inferences therein." *Gazette v. City of Pontiac*, 41 F.3d 1061, 1064 (6th Cir. 1994) (citing *Westlake v. Lucas*, 537 F.2d 857, 858 (6th Cir. 1976)); *see also Miller v. Currie*, 50 F.3d 373, 377 (6th Cir. 1995). Because a Fed. R. Civ. P. 12(b)(6) motion rests upon the pleadings rather than the evidence, "[i]t is not the function of the court [in ruling

on such a motion] to weigh evidence or evaluate the credibility of witnesses." *Miller*, 50 F.3d at 377 (citing *Cameron v. Seitz*, 38 F.3d 264, 270 (6th Cir. 1994)). However, while this standard is decidedly liberal, it requires more than the bare assertion of legal conclusions. *In re DeLorean Motor Co.*, 991 F.2d 1236, 1240 (6th Cir. 1993) (citing *Scheid v. Fanny Farmer Candy Shops, Inc.*, 859 F.2d 434, 436 (6th Cir. 1988)). Rather, the complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. *DeLorean*, 991 F.2d at 1240 (citations omitted).

IV. APPLICABLE LAW AND ANALYSIS

A. The Fourteenth Amendment Due Process Protections

To succeed on her 42 U.S.C. §1983 claim, grounded in the Fourteenth Amendment Due Process Clause, Waeschle must prove: (1) the deprivation of a property right "secured by the Constitution and the laws" of the United States; and (2) Defendants deprived her of that right acting under color of state law. *See Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978). The parties do not dispute that Dr. Ortiz-Reyes was acting under color of state law when he removed/retained Weins's brain for further studies. Indeed, MCLA §52.205(5) permits the medical examiner to retain any portion of a deceased person's body necessary for the detection of crime.

The issue in this case is whether Waeschle has a property interest in Weins's brain – protected by the United States Constitution – such that she was

entitled to notice that Weins's brain was not included with her other remains.

Property interests are created and their dimensions are defined by state law. *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972). This Court can look to the Michigan Supreme Court or other indicia of state law to determine if there is a declared property interest in a deceased relative's remains/body parts. *See Brotherton v. Cleveland*, 923 F.2d 477, 480 (6th Cir. 1991) (looking to "other indicia of state law," including state appellate court decisions to determine whether plaintiff has a protected property interest in her deceased husband's corneas); *Kveragas v. Scottish Inns, Inc.*, 733 F.2d 409, 412 (6th Cir. 1984).

Michigan law regarding general property rights are anchored in the right to possess. For example, *see* M Civ JI 19.02 – Possessor of Land – Definition. This standard instruction defines a "possessor" as, *inter alia*, a person who has the right to immediate occupation of land. The Court in *Brotherton* says Ohio avoided calling the surviving spouse's interest "property," but recognized that Ohio does grant the right to *possess* body parts of deceased relatives. *Brotherton*, 923 F.2d at 480-81 (citing *Everman v. Davis*, 54 Ohio App.3d 119, 122 (1989)).

While the legal definition of property is often tied to a physical object, the law of property has become more abstract, and a property right is often conceptualized as a "bundle of rights." *See Brotherton*, 923 F.2d at 481 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)). These rights include the right to possess, to use, to

exclude, to profit, and to dispose. *Brotherton*, 923 F.2d at 481.

Importantly, the United States Supreme Court held that "'property' interests subject to procedural due process protection are not limited by a few rigid, technical forms. Rather, 'property' denotes a broad range of interests that are secured by 'existing rules or understandings.'" *Perry v. Sindermann*, 408 U.S. 593, 601 (1972) (quoting *Roth*, 408 U.S. at 577).

If a determination is made that the next-of-kin have a state protected property interest in a deceased relative's body parts/remains post-autopsy, the issue then is whether that interest rises to the level of a "legitimate claim of entitlement," because the Due Process Clause only protects those interests which rise to such a level. *Roth*, 408 U.S. at 577. Whether an interest rises to the level of a "legitimate claim of entitlement" protected by the Due Process Clause, is determined by federal law. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 9 (1978) (citing *Roth*, 408 U.S. at 577; *Perry*, 408 U.S. at 602). "This determination does not rest on the label attached to a right granted by the state but rather on the substance of that right." *Brotherton*, 923 F.2d at 482 (citing *Mathews v. Eldridge*, 424 U.S. 319, 332; *Goldberg v. Kelly*, 397 U.S. 254 (1970)).

Waeschle relies on *Whaley v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995) and *Dampier v. Grace Hosp. Corp.*, 233 Mich.App. 714 (1999). However, the Michigan Supreme Court, as far back as 1899, addressed the interest that next-of-kin have in a deceased relative's body parts.

Doxtator v. Chicago & W. Michigan Ry. Co., 120 Mich. 596 (1899) stated the defendants were entitled to a directed verdict, not because the widow had no possessory interest in her deceased husband's remains, but because she sued the wrong party. In *Doxtator*, Thomas A. Doxtator's ("Mr. Doxtator") legs were crushed while he worked at the Chicago & West Michigan Railway Company ("Railway Company"). *Doxtator*, 120 Mich. at 597-98. Mr. Doxtator's co-workers called an ambulance to take him to the hospital. *Id.* at 598. The doctors knew, upon Mr. Doxtator's arrival, that his injuries were fatal. Nevertheless, Dr. Wooster, a Railway Company employee, amputated Mr. Doxtator's legs. *Id.* at 598-99. After the operation, the orderly of the hospital burned the fragments. *Id.* at 599. Mr. Doxtator's wife sued the Railway Company, which turned the body over to the hospital. The Michigan Supreme Court held that:

> the one whose duty it is to care for the body of the deceased is entitled to *possession* of the body, as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it in any way.

Id. at 597 (citations omitted) (emphasis added). In this holding, the court found Dr. Wooster had a duty to operate on Mr. Doxtator, but not the duty to ensure Mr. Doxtator's remains were delivered to his widow when death ensued. *Id.* at 600-01.

In *Keyes v. Konkel*, 119 Mich. 550 (1899), after the undertaker fitted the body for burial, he refused to release it until payment. *Keyes*, 119 Mich. at 550. The

Michigan Supreme Court held that next-of-kin have a quasi-property right to control/bury a dead body. *Id.* at 551 (citations omitted). The Court held that the cause of action was "not for the damage to the corpse as property, but damage to the next of kin by infringement of his right to have the body delivered to him for burial without mutilation." *Id.*

Deeg v. City of Detroit, 345 Mich. 371 (1956) relies on *Doxtator* to hold plaintiff had a cause of action when she did not give permission for an autopsy, and organs were removed unnecessarily. *Deeg*, 345 Mich. at 376-77 (rev'd on other grounds).

All of the above cases are long-standing Michigan Supreme Court cases which acknowledge the possessory interest that next-of-kin have in a deceased relative's remains, and that they have a right to the return of body parts.

Whaley recognized that Michigan law is substantively identical to Ohio law, but "[Michigan] courts have explicitly held what Ohio courts have not: that the next of kin have a right to possess the body for burial and prevent mutilation." *Whaley*, 58 F.3d at 1114-15.

Dampier is simply the latest pronouncement of Michigan courts on the subject; it recognized that plaintiff stated a federal constitutional claim for violation of a property right, *See Dampier*, 233 Mich.App. at 735, and based its holding on *Whaley*, which relied on *Doxtator*, *Keyes* and *Deeg*. The *Dampier* court pointed out an important part of the *Whaley* holding – albeit in a footnote – when it stated that:

> the Sixth Circuit Court of Appeals did not believe that the fine distinctions made by the Ohio and Michigan courts regarding the labels to be assigned this right were of any particular significance to its decision and stated that the rights of the next of kin in the body were at the "heart and soul of the common law understanding of 'property.'"

Id. at 735 n.3 (quoting *Whaley*, 58 F.3d at 1115).

Further, Michigan statutes address the possessory interest that next-of-kin have in a deceased relative's remains/body parts. *See e.g.*, MCLA §700.3206(1) ("Subject to [MCLA §52.205(5)], a [next-of-kin] is presumed to have the right and power to make decisions about funeral arrangements and the handling, disposition, or disinterment of a decedent's body, including, but not limited to, decisions about cremation, and the right to possess cremated remains of the decedent"); MCLA §52.205(5) ("the medical examiner may retain, *as long as may be necessary*, any portion of the body believed by the medical examiner to be necessary for the detection of any crime") (emphasis added). The power of the medical examiner to retain a deceased person's remains/body parts ends once the cause of death is determined. Upon completion of the autopsy, the next-of-kin are entitled to possession of their deceased relative's remains "as [they are] when death comes" (i.e., the complete body). *See Doxtator*, 120 Mich. at 597.

Based on Michigan Supreme Court precedent, as interpreted by the Sixth Circuit Court of Appeals, this Court holds that Waeschle states a 42 U.S.C. §1983

cause of action under the Fourteenth Amendment Due Process Clause.

The Court is not persuaded by *Albrecht v. Treon*, No. 2008-Ohio-2617 (S.D. Ohio June 5, 2008), relied on by Defendants. This Court's analysis – grounded in whether Waeschle has a property interest in her mother's remains – does not depend on whether Weins's brain was removed pursuant to a statutorily mandated autopsy or for a charitable purpose. Also, *Albrecht* was decided under Ohio law, and the Ohio General Assembly had enacted a statute which classified autopsy specimens as "medical waste" and authorized the coroner to dispose of it as such.

Defendants characterize the holding in *Keyes* as mere dicta which cannot be relied on by this Court as a definitive statement by the Michigan Supreme Court regarding the rights of family members to the body parts of deceased relatives.

The Court disagrees. In *Keyes*, plaintiff brought a replevin action, which was the correct cause of action to recover personal goods or chattel unlawfully taken. The Court necessarily had to determine that the corpse did not fall into the category of personal goods or chattel; rather, the court found that defendant infringed on the right of the next-of-kin to have the body delivered to him for burial without mutilation. *See Keyes*, 119 Mich. at 550-51.

Similarly, the holding in *Deeg* was not dicta. Two questions were presented in that appeal: Did the widow have a cause of action for mutilation when no one authorized an autopsy and organs were removed; and, if so, did her cause of action survive her own

death? Critical to the court's holding on the first question was that there was a person entitled to the possession, control and burial of the body; otherwise, there could not have been a finding that there was a duty to not unlawfully and intentionally mutilate it. *See Deeg*, 345 Mich. at 375. This critical holding also was the underpinning of the court's second holding: that because it was a personal right to possession, the right did not survive the widow's own death. *See id.* at 379.

Finally, the Court believes the language in *Doxtator* was not dicta. The *Doxtator* court could not have reached the issue of whether Dr. Wooster had the duty to return Mr. Doxtator's body to his widow when death ensued, if Michigan did not recognize the next-of-kin's right to a deceased relative's remains/body parts.

The Sixth Circuit Court of Appeals confirms that the Michigan Supreme Court's holding regarding a next-of-kin's interest in a deceased relative's remains/body parts is not dicta. *See Whaley*, 58 F.3d at 115 ("The Supreme Court of Michigan has repeatedly held that the next of kin '[are] entitled to possession of the body as it is when death comes, and that it is an actionable wrong for another to interfere with that right by withholding the body or mutilating it any way'") (citing *Doxtator*, 120 Mich. at 597; *Keyes*, 119 Mich. at 551; *Deeg*, 345 Mich. at 376).

Since this Court is not limited in its review to state supreme court decisions, but can look to "other indicia of state law," such as appellate decisions, *See Brotherton*, 923 F.2d at 480, the Court is further persuaded that Michigan recognizes that next-of-kin have some property interest in the remains of deceased

relatives. Waeschle alleges the existence of "rules and understandings" which justify her "legitimate claim of entitlement" to her mother's body parts. *See Perry*, 408 U.S. at 601-03 ("A person's interest . . . is a 'property' interest for due process purposes if there are . . . rules or mutually explicit understandings that support his claim . . . and that he may invoke at a hearing").

Although the facts in prior precedent are not directly on point, there is a close correspondence between prior precedent and Waeschle's case. The Court finds this nexus is sufficient to support Waeschle's Fourteenth Amendment due process claim.

B. No Reason to Certify a Question to the Michigan Supreme Court

"When a federal court . . . considers a question that Michigan law may resolve and that is not controlled by Michigan Supreme Court precedent, the court may . . . certify the question to the Michigan Supreme Court." MCR 7.305(B)(1).

This Court finds no question that Michigan law may resolve is presented here. The property right is sufficiently established, and whether that right rises to the level of a "legitimate claim of entitlement," protected by the Due Process Clause of the Fourteenth Amendment, is a matter of federal law. *See Memphis Light, Gas & Water Div.*, 436 U.S. at 9.

Further, the Court declines to certify a question to the Michigan Supreme Court simply because the facts of Waeschle's case are similar to *Albrecht*, where the court did certify a question to the Ohio Supreme Court.

When *Albrecht* was decided, the Ohio Supreme Court had not considered whether next-of-kin have a property interest in a deceased relative's remains/body parts. Importantly, the Michigan Supreme Court decided that issue in 1899.

There is a genuine issue of material fact regarding whether Defendants violated Waeschle's due process right to notice that Weins's remains did not contain her brain.

V. CLEARLY ESTABLISHED CONSTITUTIONAL RIGHT

In addition to Waeschle's burden to prove Defendants violated a constitutional right, Waeschle must prove the right is "clearly established." *See Saucier v. Katz*, 533 U.S. 194, 200-01 (2001). The Court must decide: (1) did Waeschle identify a clearly established constitutional right that was violated?; and (2) whether Defendants reasonably should have known their conduct was in violation of that right. *Collins v. Crabbe*, 1999 WL 55279 at *2 (6th Cir. Jan. 12, 1999) (citing *Johnson v. Estate of Laccheo*, 935 F.2d 109, 111 (6th Cir. 1991)); *see also Durham v. Nu'Man*, 97 F.3d 862, 868 (6th Cir. 1996):

> For a right to be "clearly established," the contours of the right must be sufficiently clear that a reasonable official would understand that his or her conduct violates that right. The unlawfulness of the official or employee's conduct must be *apparent* in light of pre-existing law. A right is not considered clearly established unless it has been authoritatively decided by the United States

> Supreme Court, the Court of Appeals, or the highest court of the state in which the alleged constitutional violation occurred.

(citations omitted) (emphasis added).

If Waeschle's constitutional right is not a clearly established right, Defendants are entitled to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (citations omitted). And, summary judgment on Waeschle's due process claim is appropriate. *See Poe v. Haydon*, 853 F.2d 418, 425 (6th Cir. 1988) (citing *Green v. Carlson*, 826 F.2d 647, 652 (7th Cir. 1987)).

Citing *Blake v. Wright*, 179 F.3d 1003 (6th Cir. 1999), Defendants argue that Waeschle's constitutional right was not clearly established because they acted under the authority of a Michigan statute. *See Blake*, 179 F.3d at 1010-13 (holding defendant is entitled to qualified immunity for a statutory violation if the law is not clearly established).

The Court finds that Waeschle's constitutional right to notice that she did not receive Weins's brain is clearly established for two reasons. First, the Michigan Court of Appeals authoritatively decided that the next-of-kin have a cognizable claim under the Fourteenth Amendment for violation of the right to a deceased relative's body, *See Dampier*, 233 Mich.App. at 737, therefore, "[t]he unlawfulness of [Defendants'] conduct [was] apparent in light of pre-existing law." *See Durham*, 97 F.3d at 688.

Second, Michigan law authorizes autopsies and the removal/retention of organs "as long as may be

necessary" for forensic examination when a criminal investigation is pending. *See* MCLA §§ 52.202(1); 52.205(5). This language presumes that the retention is for a limited period of time. Defendants do not cite a Michigan statute that gives them the authority to release a deceased person's body and not inform the next-of-kin that an organ is missing. Nor do they cite a statute that allows retention beyond the time necessary for forensic examination.

Indeed, Michigan law favors the release of a deceased person's complete body to the next-of-kin. *See* MCLA §52.205(4) ("The medical examiner shall . . . notify immediately as compassionately as possible the next of kin of the death and the body"); MCLA §52.205(5) ("The county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased"); *see also Whaley*, 58 F.3d at 1115 (Michigan law provides the next-of-kin with a "right to possess the body for burial and prevent its mutilation").

Based on Michigan's clearly established law that the next-of-kin have an interest in their deceased relative's remains/body parts, Defendants reasonably should have known they were violating Waeschle's right when Weins's brain was removed/retained without notice to Waeschle.

VI. STATE LAW CLAIMS

A. Negligent Infliction of Emotional Distress

Waeschle can only recover for negligent infliction of emotional distress if she "witnesse[d] negligent injury to a third person and suffer[ed] mental disturbance as

a result." *See Duran v. Detroit News, Inc.*, 200 Mich.App. 622, 629 (1993).

Waeschle's negligent infliction of emotional distress claim fails to state a claim upon which relief can be granted and is dismissed for two reasons. First, Waeschle does not allege that she witnessed a negligent injury to Weins. The stated cause of action is removal of body parts and failure to give notice of the removal, and retention of body parts.

Second, negligent infliction of emotional distress is not the appropriate cause of action for the failure to notify family members that their deceased relative's body does not have all of its organs.

B. Intentional Infliction of Emotional Distress

When the Court construes Waeschle's Complaint liberally in her favor and accepts all factual allegations as true, *See Miller*, 50 F.3d at 377, her intentional infliction of emotional distress claim fails as a matter of law. The Complaint contains the "bare assertion of legal conclusions" insufficient to survive a motion to dismiss. *See DeLorean*, 991 F.2d at 1240. For example, Waeschle's Complaint simply alleges that "each next-of-kin will have a cause of action for . . . intentional infliction of emotional distress."

Even if Waeschle's Complaint alleged "direct or inferential allegations respecting all the material elements to sustain a recovery [for intentional infliction of emotional distress]," *See id.*, Waeschle's claim would still fail as a matter of law.

To succeed on her claim for intentional infliction of emotional distress, Waeschle must prove: (1) extreme and outrageous conduct; (2) intent or recklessness; (3) causation; and (4) severe emotional distress. *Roberts v. Auto-Owners Ins. Co.*, 422 Mich. 594, 602 (1985). Liability has only been found:

> where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse resentment against the actor, and lead him to exclaim, "Outrageous!"

Id. at 602-03 (quoting Restatement (Second) of Torts §46, comment d, p. 72-73).

"It is generally the duty of the trial court to determine whether a defendant's alleged conduct may reasonably be regarded as so 'outrageous.' Where reasonable minds may differ, the question is for the jury." *Garretson v. City of Madison Heights*, 407 F.3d 789, 799 (6th Cir. 2005) (internal citation omitted).

It is not "utterly intolerable in a civilized community," *See Roberts*, 422 Mich. at 603, to retain a deceased person's brain for further examination after the completion of a lawful autopsy without notifying the next-of-kin. Indeed, the statute authorizes the removal and retention of body parts "as long as may be necessary . . . for the detection of . . . crime." MCLA §52.205(5).

C. Additional State Law Claim

Waeschle contended at oral argument that under established precedent, she has a state law claim for the retention and destruction of her mother's body part without notice. This may be true, but neither negligent nor intentional infliction of emotional distress is the correct cause of action.

VII. CONCLUSION

Defendants' motion for summary judgment is **GRANTED IN PART AND DENIED IN PART**. The Court dismisses Waeschle's state law claims of negligent infliction of emotional distress and intentional infliction of emotional distress. Waeschle's case, on behalf of herself and others similarly situated, will proceed on the 42 U.S.C. §1983 due process claim.

IT IS ORDERED.

s/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: September 19, 2008

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on September 19, 2008.

s/Linda Vertriest
Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-2228

[Filed October 23, 2009]

KAREN WAESCHLE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Plaintiff-Appellee,

v.

LJUBISA J. DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, ET AL.

Defendants-Appellants.

BEFORE: GILMAN and MCKEAGUE, Circuit Judges; and BARRETT,* District Judge.

* Hon. Michael R. Barrett, United States District Judge for the Southern District of Ohio, sitting by designation.

The court having received a petition for rehearing en banc, which was circulated to all active judges of this court, none of whom requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

Supreme Court, U.S.
FILED
FEB 23 2010
OFFICE OF THE CLERK

No. 09-879

In The
Supreme Court of the United States

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Petitioner,

v.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and In his official capacity as Medical Examiner of Oakland County, Michigan, and on behalf of Others similarly situated, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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I.

INTRODUCTION

In this 42 U.S.C. §1983 case, the United States Court of Appeals for the Sixth Circuit was faced with the question of whether Petitioner had a right under Michigan law to possess her mother's brain after it had been properly removed, dissected and examined by a county medical examiner following an authorized autopsy in a criminal investigation. Recognizing that no such right was clearly established, the Court of Appeals held the medical examiner was immune. As to the county government, the Court of Appeals concluded it could not determine whether Michigan law recognized a right to possess the brain under the circumstances and directed the District Court to certify the question to the Michigan Supreme Court. The District Court has done so and the matter is currently pending in the Michigan Supreme Court.

Petitioner claims the Sixth Circuit has impermissibly invited the Michigan Supreme Court to overrule binding federal constitutional decisions on this issue. Petitioner's petition should be denied for two reasons. **First**, there are no decisions on this issue, the Sixth Circuit held that the decisions relied on by Petitioner are clearly distinguishable, and it followed the admonition of this Court to defer to the state when state law is unsettled. **Second**, as Petitioner recognizes, there is no compelling reason for this Court to hear this case at this time. Quite simply, Petitioner is concerned that the Michigan Supreme Court has been "invited" to decide the state law issue and it is "possible" the state court may not rule in her favor. At this time, she has suffered no harm and,

depending on the action of the Michigan Supreme Court, may never. Petitioner's request for an advisory opinion from this Court on the assumption that she will lose in the Michigan Supreme Court is improper.

II.

STATEMENT OF THE CASE

The Sixth Circuit Court of Appeals held that the doctrine of qualified immunity protected Oakland County Medical Examiner Ljubisa J. Dragovic against the claims brought by Petitioner under 42 USC §1983. Petitioner's claimed property right to the return of the brain of her mother following a properly authorized autopsy is not clearly established. The Court held that the facts in this case distinguished it from any existing federal cases:

> *Brotherton* [*v. Cleveland*, 923 F.2d 477 (6th Cir. 1991)] and *Whaley* [*v. County of Tuscola*, 58 F.3d 1111 (6th Cir. 1995)], however, are distinguishable from the present case. The key difference is that the brain of Waeschle's mother was removed and retained for study by the Medical Examiner in furtherance of a lawful criminal investigation. By contrast, the removal of corneas in *Brotherton* and *Whaley* served no investigative function whatsoever.

576 F.3d 539, 546-47.

In *Brotherton*, the plaintiff filed a §1983 claim because the coroner removed her husband's corneas during an autopsy after she had specifically refused to allow this to be done. The removal of the corneas was

unrelated to the investigative purpose of the autopsy. The Sixth Circuit held that Ohio law gave the plaintiff sufficient rights to create a legitimate claim to entitlement to the return of her husband's corneas. *Brotherton* did not concern, analyze or apply Michigan law in any respect.

Whaley did. *Whaley* arose after it was discovered that the assistant to a pathologist removed the corneas and sometimes the eyeballs of corpses after an autopsy was finished and then sold them for a profit, without the knowledge or the consent of the next-of-kin of the decedent. The removal of the corneas and eyeballs was unrelated to the investigative purpose of the autopsy. As the Sixth Circuit stated, "The interesting question raised in this consolidated appeal is what relief the Constitution might provide when a state actor steals the eyes of a dead man." 58 F.3d. at 1112-13. Relying primarily on its interpretation of two 19th century decisions of the Michigan Supreme Court, the Sixth Circuit held that under Michigan law the next-of-kin have a right to possess the body for burial and prevent its mutilation. *Id.* at 1115.

In this case, the Sixth Circuit distinguished *Whaley* and determined that no Michigan decision had considered the situation presented here:

> None of these cases consider the situation where body parts were removed and retained during an autopsy for study in the course of a properly authorized criminal investigation.

***

> In sum, Michigan law regarding the rights of the next of kin in their relative's body parts removed for forensic examination during an autopsy is at best equivocal.

Id at 549, 550.

The Court questioned whether any right existed under Michigan law to the return of a brain which was removed and examined as part of a criminal investigation during a properly authorized autopsy. Noting that *Whaley* did not involve the Michigan Medical Examiner statute (MCL 52.205) and that no federal or Michigan case involved the failure to return a body part which had been removed pursuant to a valid investigative reason during an autopsy, the Court found Petitioner's due process claim turned on the answer to this unsettled question of state law. 576 F.3d at 550-51. Accordingly, the Sixth Circuit directed the District Court to certify the question to the Michigan Supreme Court for resolution. The District Court certified the question to the Michigan Supreme Court (Order of November 2, 2009, Appendix A), where the matter is currently pending.

III.

ARGUMENT

THE SIXTH CIRCUIT PROPERLY SOUGHT A DEFINITIVE RULING ON UNCERTAIN MICHIGAN LAW FROM THE MICHIGAN SUPREME COURT

There is no question that federal constitutional law ultimately determines whether an underlying property

interest is protected by the due process clause of the Fourteenth Amendment. *Memphis Light, Gas & Water Div. v. Kraft*, 436 U.S. 1, 9, 56 L. Ed. 2d 30, 98 S.Ct. 1554 (1978). There is also no question that "(r)esolution of the federal issue begins, however, with a determination of what it is that state law provides." *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757, 162 L. Ed. 2d 658, 125 S.Ct. 2796 (2005). Moreover, as this Court has recognized, "(f)ederal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 48, 137 L. Ed. 2d 170, 117 S.Ct. 1055 (1997). For that reason, this Court has encouraged certification of questions concerning uncertain state law to the appropriate state court:

> "Certification procedure, in contrast, allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response. ... (to warrant district court certification, "it is sufficient that the statute is susceptible of ... an interpretation (that) would avoid or substantially modify the federal constitutional challenge to the statute.").

Id. at 76-77.

In this case, the Sixth Circuit carefully examined and considered all of the case law and statutes cited by Petitioner in support of her claim before concluding it was not certain whether Michigan law gave Petitioner the property interest she claimed in her deceased mother's brain. Had it chosen to do so, the Sixth

Circuit could also have pointed to at least two decisions from Michigan state courts that cast further doubt on Petitioner's assertion of a property right in her mother's brain under Michigan law. In *Dampier v. Grace Hospital*, 233 Mich. App. 714, 592 N.W. 2d 809 (1999), the Michigan Court of Appeals stated that, "Michigan does not recognize a property right in a dead body" and that any "common law right of burial of a deceased person without mutilation ... is not of constitutional dimension." 233 Mich. App. at 731. In *Summers v. Hurley Medical Center*, Michigan Court of Appeals Case No. 269824 (August 23, 2007) (Appendix B), the Michigan Court of Appeals upheld the dismissal of a complaint attempting to set forth a number of state law claims arising from the removal of the plaintiff's decedent's heart during an autopsy without her knowledge or authorization and the failure to return the heart for three years. In upholding the dismissal of the complaint, the court stated, "Plaintiff ... (alleged) a claim based on the common law tort of interference with the right of burial of a deceased person with mutilation ...an essential element of the tort is that the alleged mutilation must be wrongful."

This Court has a long-standing policy of paying deference to the view of a federal court concerning the laws of a state within its jurisdiction. *Phillips v. Washington Legal Found.*, 524 U.S. 156, 167, 141 L. Ed. 2d 174, 118 S.Ct. 1925 (1998). At least in part, this is based on this Court's belief "that district courts and courts of appeal are better schooled in and more able to interpret the laws of their respective states." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500-501, 86 L. Ed. 2d 394, 105 S.Ct. 2794 (1985).

> "(I)t is precisely when there is no state law on point that the presumption that circuits have local expertise plays any useful role. When a circuit's resolution of a novel question of state law is grounded on a concededly complete review of all the pertinent state-law materials, that decision is entitled to deference."

Town of Castle Rock v. Gonzales, 545 U.S. 748, 776, 162 L. Ed. 2d 658, 125 S. Ct. 2796 (2005) (Stevens, dissenting.).

There simply is no reason for this Court to depart from its practice of deference in this case. The Sixth Circuit undertook a careful review of applicable Michigan law before finding that there was no clearly established property right such as the one asserted by Petitioner and, therefore, properly dismissed the claims against the medical examiner. It also sought a definitive interpretation of Michigan law from the highest state court of Michigan – a completely appropriate and uncontroversial decision under the circumstances of this case – especially pertinent since this Court's recent decision in *Pearson v. Callahan*, 129 S.Ct. 808 (2009).

The decision of the Sixth Circuit does not seek to abrogate vested rights as claimed by Petitioner. Rather, it seeks the decision of the only court which is authorized to determine unsettled questions of Michigan law – the Michigan Supreme Court.

THERE ARE NO "COMPELLING REASONS" TO GRANT CERTIORARI IN THIS CASE

The rules of this Court state that "(a) petition for a writ of certiorari will be granted only for compelling reasons." Sup. Ct. R. 10. The only actual reason the Petitioner has provided in her Petition is that she disagrees with the decision of the Sixth Circuit. Obviously, the decision of the Sixth Circuit was not what Petitioner had hoped for, but if Petitioner actually has a property right under Michigan law to her mother's brain after the completion of a lawful and properly authorized autopsy, she has little to fear from this decision, since the Michigan Supreme Court is presumably capable of recognizing Michigan property rights.

Petitioner apparently is not confident the highest court of Michigan will favor her. Petitioner argues that certification of the issue is inappropriate because the Sixth Circuit had already determined that the conduct complained of by Petitioner is a violation of the federal Constitution. Reading Petitioner's argument after reading the opinion of the Sixth Circuit, one cannot help but feel like Alice must have felt after stepping through the looking glass and finding things the opposite of what they were in the real world. In fact, the Sixth Circuit has never determined that the conduct at issue is a violation of the federal Constitution, and it has not asked the Michigan Supreme Court to address any issue of federal law. That may be why the court unanimously ruled against Petitioner and also why Petitioner's request for a rehearing and rehearing en banc was denied.

Petitioner asserts again and again and again that both Michigan and federal law are settled on the material issues considered by the Sixth Circuit. However, the Court found that the reasoning it applied in determining that when a person acting under color of state law steals a body part for private gain does not dictate the outcome of a case in which a medical examiner performs a properly authorized autopsy and properly retains a body part for forensic examination related to a criminal investigation.

Petitioner's second argument is that, by directing the Michigan Supreme Court to answer the question of whether a decedent's next-of-kin have a right under Michigan law to possess the decedent's brain after it has been removed by a medical examiner in order to conduct a lawful criminal investigation into the decedent's cause of death, the Sixth Circuit is somehow inviting the state court to interpret or overrule federal law or retroactively eliminate existing rights under federal law. This argument is equally without merit. The Sixth Circuit invited and directed only what federal courts are empowered to do – to ask the highest court of the state to determine a question of uncertain state law. Petitioner would prefer that *Whaley* be dispositive on the issue of the existence of a property right under Michigan law under the circumstances of this case and the Petitioner's right to proceed with a claim under §1983. This is a claim the parties thoroughly briefed and argued before the Sixth Circuit, and one which the Sixth Circuit carefully examined and rejected in its decision.

Petitioner's attempt to now ignore the actual analysis and directive of the court below can do nothing to change that analysis or directive. The Sixth

Circuit could not have been clearer. It did not ask the Michigan Supreme Court to apply, interpret, or overrule federal law or the United States Constitution. It only asked the Michigan Supreme Court to do what it is well qualified to do – interpret Michigan law, just as the federal court in Ohio simply asked the Ohio Supreme Court to interpret Ohio law in *Albrecht v. Treon*, No. 1:06CV274, 2007 U. S. Dist LEXIS 18613 (S.D. Ohio Mar. 12, 2007), another decision to which Petitioner makes a point of objecting, even though it is not before this Court. In fact, federal courts turn to state courts for their superior understanding and interpretation of the laws of their own states not only when the law is uncertain, but also when a state court decision raises a question as to whether a decision of a federal court interpreting that law was correct. *E.g., D. L. Thomas v. Am. Home Prods., Inc.*, 519 U.S. 913, 913-914, 136 L. Ed. 2d 201, 117 S.Ct. 282 (1996) (Scalia, concurring.).

Finally, review by this Court at this time is premature and would constitute the constitutional harm which Petitioner claims is hers – it would intrude into Michigan's sovereignty. It is premature in Petitioner's own words – she is concerned it is "possible" the Michigan Supreme Court will rule against her because the Sixth Circuit "invited" it to overrule federal constitutional law. Petitioner's Petition at 11. Regardless of Petitioner's mischaracterization and the Michigan Supreme Court's demonstrated independence from the federal courts over the years, Petitioner has not been harmed and my never be harmed. The decision of the Michigan Supreme Court will merely return the case to the District Court where further proceedings will occur. No discovery has occurred in this case and the

full factual record has yet to be developed. Either party who is aggrieved after a final decision by the District Court has a right to appeal, eventually to this Court. As to sovereignty and federalism and despite Petitioner's protestations to the contrary, it is Petitioner who is inviting this Court to intrude into a realm reserved to Michigan – deciding the property rights of its citizens. Whether those rights are of constitutional dimension may be a question for the federal courts, but the foundational decision is Michigan's. *Town of Castlerock v. Gonzales*, 545 U.S. 748, 757, 162 L. Ed. 2d 658, 125 S.Ct. 2796 (2005).

IV.

CONCLUSION

This case does involve significant issues. However, the decision of the Sixth Circuit is not an attack on the principles of federalism or an attempt to destroy rights granted by federal law. It is simply a request for an interpretation of uncertain state law by a state court. The imagined parade of horribles chronicled in Petitioner's pleadings do not exist. There are no compelling reasons to grant her Petition – she complains only of a potential to suffer harm which has not occurred. Her Petition should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CASE NUMBER: 08-10393
HONORABLE VICTORIA A. ROBERTS

[Filed November 12, 2009]

KAREN WAESCHLE, individually and on behalf of others similarly situated,

Plaintiff(s),

v.

OAKLAND COUNTY MEDICAL EXAMINER, LJUBISA J. DRAGOVIC, M.D., individually and in his official capacity as Medical Examiner of Oakland County, Michigan, and OAKLAND COUNTY, MICHIGAN, a municipal corporation,

Defendant(s).

ORDER

Pursuant to the Judgment from the Sixth Circuit entered on July 22, 2009, this Court granted

Defendants' Motion for Summary Judgment, and entered Judgment in favor of Defendants on August 3, 2009.

On August 14, 2009, the Sixth Circuit filed an Amended Opinion.

Pursuant to the Amended Opinion, this Court's August 3, 2009 Order and Judgment (Docs. #83 and #84) are **VACATED**, Dr. Ljubisa J. Dragovic's Motion for Summary Judgment (Doc. #49) is **GRANTED** with respect to Plaintiff's individual-capacity claim against him, and Defendants' motion to certify the question of state law to the Michigan Supreme Court (Doc. #49) is **GRANTED**.

On or before **November 30, 2009**, Defendants must file a brief with this Court that addresses why they believe the Michigan Supreme Court should decide the question of state law, and why they believe Michigan law has not established a property right in body parts. Plaintiff must respond by **December 14, 2009**.

The Court will send a letter, the briefs, and the Amended Opinion from the Sixth Circuit to the Michigan Supreme Court. All proceedings in this Court will then be stayed pending the outcome in the Michigan Supreme Court.

IT IS ORDERED.

S/Victoria A. Roberts
Victoria A. Roberts
United States District Judge

Dated: November 12, 2009

The undersigned certifies that a copy of this document was served on the attorneys of record by electronic means or U.S. Mail on November 12, 2009.

s/Carol A. Pinegar
Deputy Clerk

* **NOTE:** All briefs shall comply strictly with LR 7.1 (Statement of Issues, Statement of Controlling/Most Appropriate Authority), and, in addition, **must** contain a Table of Contents, an Index of Authorities and an Index of Exhibits. The Exhibits must be tabbed. LR 7.1(a) seeking concurrence requirement and the format requirements as set forth in LR 5.1 must be strictly adhered to. **Relevant passages of exhibits must be highlighted on the Judge's courtesy copy.**

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS

No. 269824
Genesee Circuit Court
LC No. 05-081687-CZ

UNPUBLISHED
August 23, 2007

TINA SUMMERS,

Plaintiff-Appellant,

v

HURLEY MEDICAL CENTER, PATHOLOGY ASSOCIATES, P.C., GARY JOHNSON, CATHY O. BLIGHT, JERRY S. KRZNARICH, and LINDA BIEDRZYCKI,

Defendants-Appellees

and

MARCIA E. PERRY,

Defendant.

Before: Davis, P.J., and Schuette and Borrello, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's order dismissing this case, with prejudice, with respect to each defendant-appellee. We affirm the order of dismissal, but vacate the portion of the trial court's April 3, 2006, order awarding attorney fees and costs to defendant Hurley Medical Center.

On June 20, 2005, plaintiff filed a complaint against the six defendants-appellees, Hurley Medical Center (hereafter "Hurley Medical"), Pathology Associates, P.C. (hereafter "Pathology P.C."), Lynda Biedrzycki,[1] Jerry Krznarich, Gary Johnson, and Cathy Blight, and two other defendants, Hurley Health Services and Marcia Perry, arising out of the alleged mishandling of her son's body after he died on March 15, 2001. The complaint alleged that the decedent's heart was removed, without plaintiff's knowledge or authorization, as part of an autopsy to determine the cause of death. The heart was allegedly transferred to Biedrzycki, a medical examiner in the state of Wisconsin, for an examination, but was not returned to Michigan until March 2004. Plaintiff allegedly made several inquiries regarding the status of the autopsy and learned about the removal of the decedent's heart before Biedrzycki returned the heart to Michigan. Plaintiff alleged claims against the

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[1] Although the April 12, 2006, order and this Court's docket caption identify Biedrzycki's first name as "Linda," the original complaint contained the spelling "Lynda," consistent with Biedrzycki's own appeal brief.

various defendants based on gross negligence (Count I), ordinary negligence (Count II), interference with right of burial (Count III), negligent infliction of emotional distress (Count IV), and intentional infliction of emotional distress (Count V).

Answers to the complaint were thereafter filed by Johnson and Biedrzycki in August 2005, and by Blight and Hurley Health Services in September 2005. On October 17, 2005, the trial court entered a stipulated order granting Hurley Medical's motion for a more definite statement. The trial court ordered that plaintiff file a more definite statement with respect to each defendant. Despite being afforded two opportunities to do so, plaintiff failed to conform her complaint to the trial court's ruling leading to the ultimate dismissal of her action.

On appeal, plaintiff first challenges the trial court's December 12, 2005, order requiring that she file a second more definite statement. In general, a plaintiff's claims may be involuntarily dismissed for failure to comply with the court rules or a court order. MCR 2.504(B)(1). A dismissal for failure to comply with a court order is reviewed for an abuse of discretion. *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006). Such a dismissal is a drastic sanction that requires consideration of several factors, including:

> (1) whether the violation was wilful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the

> court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice. [*Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 506; 536 NW2d 280 (1995) (citation omitted).]

In this case, it is apparent that the trial court did not rely solely on plaintiff's failure to comply with its order requiring plaintiff to file a second more definite statement when dismissing the case, but also considered the merits of plaintiff's various claims with respect to both the notice of a claim that it afforded to defendants-appellees and whether the allegations were sufficient to state a claim. Here, plaintiff argues that a second amended complaint was unnecessary because her earlier more definite statement was sufficient to both provide adequate notice and state a claim.

"Each allegation in a pleading must be clear, concise, and direct." MCR 2.111(A)(1). The complaint must contain "[a] statement of the facts, without repetition, on which the pleader relies in stating the cause of action, with the specific allegations necessary reasonably to inform the adverse party of the nature of the claims the adverse party is called on to defend." MCR 2.111(B)(1); see also *Iron Co v Sundberg, Carolson & Assocs, Inc*, 222 Mich App 120, 124; 564 NW2d 78 (1997). The degree of specificity sufficient to satisfy the court rule generally depends on the circumstances of the case and the nature of the action. *Dacon v Transue*, 441 Mich 315, 332; 490 NW2d 369 (1992); *Porter v Henry Ford Hosp*, 181 Mich App 706, 709; 450 NW2d 37 (1989); *Martinez v Redford Community Hosp*, 148 Mich App 221, 229-230; 384 NW2d 134 (1986); but see MCR 2.112(B)(2) (conditions of the mind may be pleaded generally).

We review a trial court's decision regarding the meaning and scope of a pleading for an abuse of discretion. *Weymers v Khera*, 454 Mich 639, 654; 563 NW2d 647 (1997). A trial court's decision on a defendant's motion for a more definite statement or to strike a pleading that allegedly is so vague or ambiguous that it does not conform with the rules, is also reviewed for an abuse of discretion. *Belle Isle Grill Corp v Detroit*, 256 Mich App 463, 469; 666 NW2d 271 (2003). A trial court abuses its discretion when its decision "results in an outcome falling outside the principled range of outcomes." *Woodard v Custer*, 476 Mich 545, 557; 719 NW2d 842 (2006).

But if a defendant's real challenge to the complaint is that the complaint does not state a claim, the motion may be treated as a motion for summary disposition under MCR 2.116(C)(8). See *Hetterle v Chido*, 155 Mich App 582, 586; 400 NW2d 324 (1986). Such as motion is reviewed de novo based on the pleadings alone. *Maiden v Rozwood*, 461 Mich 109, 118-119; 597 NW2d 817 (1999). "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* at 119. Summary disposition is appropriate only if the claims are so clearly unenforceable as a matter of law that no factual development could justify recovery. *Id.* Conclusory statements, unsupported by factual allegations, are insufficient to state a claim. *Ypsilanti Fire Marshal v Kircher (On Reh)*, 273 Mich App 496, 544; 730 NW2d 481 (2007). Similar to the discretion afforded to a trial court under MCR 2.115, to grant a defendant's motion for a more definite statement, a plaintiff against whom summary disposition is granted under MCR 2.116(C)(8) may move to amend the

complaint. See MCR 2.116(I)(5); *Weymers*, *supra* at 654.

In this case, considering that plaintiff brought multiple counts against multiple defendants and that the record discloses that the trial court believed that summary disposition motions would likely be filed if a more definite statement was not provided, we find merit to plaintiff's argument that MCR 2.116(C)(8) might provide a more appropriate framework for determining the sufficiency of some of her claims against defendants-appellees than the standard in MCR 2.111(B). But having considered the allegations in the first more definite statement, we conclude that plaintiff has not demonstrated any claim that was sufficiently pleaded to render the need for another more definite statement, or an amended complaint, unnecessary.

With respect to Pathology Associates, P.C., the more definite statement only alleges that this entity was at all relevant times a professional service corporation doing business in the city of Flint. Thus, the trial court did not abuse its discretion in finding that plaintiff failed to sufficiently plead a claim against Pathology Associates. *Weymers*, *supra* at 454. Plaintiff did not provide allegations that are specific enough to reasonably inform Pathology Associates of the nature of any claim against it. MCR 2.111(B)(1); *Iron Co*, *supra* at 124.

With respect to the five other defendants-appellees, we agree with plaintiff that the use of "group" allegations against multiple defendants in a pleading is not fatal to a determination that MCR 2.111(B) was satisfied, at least in those circumstances where there

exist other allegations directed at a defendant's specific conduct to provide reasonable notice of the claim. *Johnson v A & M Custom Built Homes of West Bloomfield, PC* , 261 Mich App 719, 723; 683 NW2d 229 (2004). Plaintiff's reliance on the afore-stated concept ignores the fact that her "group" allegations were insufficient to reasonably inform the individual defendants-appellees of the nature of the claims against them, as required by MCR 2.111(B). On their face, the "group" allegations suggest some type of concerted action between the individual defendants-appellees located in Michigan in their dealings with the other defendant-appellee, Lynda Biedrzycki, who is located in Wisconsin. The trial court reasonably concluded otherwise, as is evident by its determination that plaintiff needed to file another more definite statement to direct the allegations at the specific defendant-appellee to which they applied. Further, upon considering the allegations that are directed at a specific defendant-appellee, we conclude that the trial court did not abuse its discretion in finding that a second more definite statement was necessary.

The non-group allegations against Hurley Medical Center are ambiguous with respect to whether plaintiff was attempting to hold Hurley Medical Center directly liable or indirectly responsible under some theory of vicarious liability. Vicarious liability rests on imputing the agent's conduct to the principal. *Al-Shimmari v Detroit Medical Center*, 477 Mich 280, 294; 731 NW2d 29 (2007) (negligence). Direct liability may arise, for example, where an entity negligently supervises, selects, or retains staff. See *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 11; 651 NW2d 356 (2002) (medical malpractice action against hospital).

Therefore, as with Pathology Associates, we conclude that the trial court did not abuse its discretion in ruling that plaintiff's allegations with respect to Hurley Medical were not specific enough to reasonably inform it of the nature of any claim against it.

Each of the four individual defendants-appellees allegedly had some role, in a medical examiner capacity, in handling the body of plaintiff's deceased son or authorizing autopsy work, which resulted in the removal and retention of the decedent's heart for further examination. Defendant Jerry Krznarich allegedly performed the autopsy, with the authorization of defendant Gary Johnson, the county medical examiner, and defendant Cathy Blight, the chief deputy county medical examiner, and spoke with plaintiff about the status of the autopsy and cause of death. Biedryncki allegedly received the decedent's heart in 2001, for an examination concerning the cause of death, but did not return the heart to the other defendants-appellees until 2004, long after plaintiff buried her son.

For each of the five counts, plaintiff predicated her right to relief on her parental relationship with the decedent, alleging in Count III a claim based on the common-law tort of interference with the right of burial of a deceased person without mutilation. The recovery in such an action is for the infringement of the person's right to have the body delivered for burial without mutilation, *Deeg v Detroit*, 345 Mich 371, 376; 76 NW2d 16 (1956), although the failure to return severed portions of a body for burial can also form a basis for the action. See 22A Am Jur 2d, Dead Bodies, § 46.

But an essential element of the tort is that the alleged mutilation be wrongful. *Tillman v Detroit Receiving Hosp*, 138 Mich App 683, 689-690; 360 NW2d 275 (1984); *Allinger v Kell*, 102 Mich App 798, 808; 302 NW2d 576 (1981), modified 411 Mich 1053 (1981). Here, plaintiff made vague "group" allegations in the gross negligence and negligence counts regarding the individual defendants-appellees having a duty to refrain from violating the law affecting the handling, custody, care, and transportation of dead human body remains. But plaintiff did not plead any law that was violated or attempt to assign responsibility to any specific defendant-appellee for particular acts of unlawful or wrongful conduct.

Under the circumstances, where multiple individual defendants allegedly took on different roles in the autopsy process, all in some type of medical examiner capacity, the trial court did not abuse its discretion by ordering another more definite statement to delineate the basis of plaintiff's claims. As a whole, the allegations in the more definite statement failed to provide reasonable notice of what plaintiff believed was unlawful interference with respect to each individual defendant-appellee, as required by MCR 2.111(B). Alternatively, plaintiff failed to state a claim for which relief could be granted, because Count III is based on conclusory statements, unsupported by factual allegations of any actionable unlawful interference by any individual defendant-appellee. MCR 2.116(C)(8); *Ypsilanti Fire Marshal*, *supra* at 544. Accordingly, we find no basis for disturbing the trial court's decision to dismiss Count III with respect to any individual defendant-appellee.

With respect to the separate gross negligence and negligence claims in Counts I and II of the more definite statement, we uphold the trial court's decision that a more definite statement was necessary to the extent that plaintiff's claims were predicated on the same alleged parental burial rights underlying Count III. We are not bound by a party's choice of labels for an action because this would place form over substance. *Johnston v City of Livonia*, 177 Mich App 200, 208; 441 NW2d 41 (1989). The tort of interference with the right of burial can be grounded on negligent or intentional conduct. *Allinger*, *supra* at 808.

To the extent that plaintiff attempted to plead a gross negligence or ordinary negligence claim that falls outside the common-law tort of interference with a right of burial, we uphold the trial court's decision because plaintiff did not plead a relationship with any individual defendant-appellee that gives rise to a duty. See *Buczkowski v McKay*, 441 Mich 96, 100; 490 NW2d 330 (1992) (duty concerns whether a defendant is under any obligation to act for the plaintiff's benefit), *Hampton v Waste Mgt of Michigan, Inc* , 236 Mich App 598, 602; 601 NW2d 172 (1999) (duty can arise by statute, contract, or common-law principles). "It is axiomatic that there can be no tort liability unless defendants owed a duty to plaintiff." *Fultz v Union-Commerce Assocs*, 470 Mich 460, 463; 683 NW2d 587 (2004), quoting *Beaty v Hertzberg & Golden, PC*, 456 Mich 247, 262; 571 NW2d 716 (1997). Summary disposition is proper under MCR 2.116(C)(8) if the defendant does not owe a duty to the plaintiff under the alleged facts as a matter of law. *Beaudrie v Henderson*, 465 Mich 124, 130; 631 NW2d 308 (2001); *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998).

Turning to plaintiff's claim in Count IV, negligent infliction of emotional distress, we note that this is a limited tort that is recognized where a person witnesses the negligent injury or death of a third person. It has not been extended to other situations. *Duran v Detroit News, Inc*, 200 Mich App 622, 629; 504 NW2d 715 (1994); *Gustafson v Faris*, 67 Mich App 363, 369, 241 NW2d 208 (1976); see also *Nugent v Bauermeister*, 195 Mich App 158, 161; 489 NW2d 148 (1992) (tort is limited to immediate family members). Although plaintiff alleged a parental relationship with the decedent, she has not substantiated her position that the tort applies to the allegations set forth in the more definite statement regarding the circumstances of the autopsy. Contrary to MCR 2.111(B), plaintiff's vague allegations that the "events alleged herein" caused her severe emotional distress were insufficient to reasonably inform the individual defendants-appellees of this novel theory or how it applies to each of them. At best, plaintiff's vague allegations appear to be an attempt to restate Count III. Therefore, the trial court did not abuse its discretion in ordering another more definite statement.

Finally, we reject plaintiff's claim that she plainly pleaded a claim for intentional infliction of emotional distress in Count V. Although an intention may be alleged generally, MCR 2.112(B)(2), the allegation regarding the action of Hurley Medical Center and each individual defendant-appellee is too vague to provide reasonable notice of the extreme and outrageous conduct that each individual defendant-appellee was claimed to have intentionally or recklessly committed. MCR 2.111(B). Alternatively, we uphold the trial court's decision to require another more definite statement because the conclusory

allegation was insufficient to state a claim pursuant to MCR 2.116(C)(8). See *Walsh v Taylor*, 263 Mich App 618, 634; 689 NW2d 506 (2004).

In sum, the trial court reached the right result in ordering another more definite statement, regardless of whether MCR 2.111(B) or MCR 2 .116(C)(8) provides the appropriate framework for reviewing the five counts in the more definite statement. Accordingly, plaintiff has not demonstrated any error affecting the trial court's subsequent April 12, 2006, order dismissing the case with respect to each individual defendant-appellee.

Plaintiff also argues that the trial court erred in awarding attorney fees and costs in favor of Hurley Medical Center in its April 3, 2006, order. Because Hurley Medical Center agrees on appeal that the award does not comport with any ruling made by the trial court, we vacate the portion of the court's order awarding attorney fees and costs to Hurley Medical Center. See *McDonald's Corp v Canton Twp*, 177 Mich App 153, 158-159; 441 NW2d 37 (1989).

Affirmed in part and vacated in part.

/s/ Alton T. Davis
/s/ Bill Schuette
/s/ Stephen L. Borrello

No. 09-879

In The
Supreme Court of the United States

KAREN WAESCHLE, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioner,

v.

LJUBISA J. DRAGOVIC, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS MEDICAL EXAMINER OF OAKLAND COUNTY, MICHIGAN, AND OAKLAND COUNTY, MICHIGAN, A MUNICIPAL CORPORATION,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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Respondents argue that the Sixth Circuit acted properly in certifying this case to the Michigan Supreme Court. As support, respondents rely on this Court's observation in *Arizonans for Official English v. Ariz.*, 520 U.S. 43, 77 (1997) that "[t]hrough certification of novel or unsettled questions of state law for authoritative answers by a State's highest court, a federal court may save 'time, energy, and resources and help build a cooperative judicial federalism.'"

That doctrine is not applicable however where the law is neither novel nor unsettled. When the law is settled on a federal issue by published, circuit decision, it violates federalism in the most fundamental way to punt something governed by that law to a state court for a second opinion. That is the issue for certification here.

The law on this issue in the Sixth Circuit was clearly established in *Whaley v. County of Tuscola ex rel. Tuscola County Bd. of Comm'rs,* 58 F.3d 1111 (6th Cir. 1995) *and Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir. 1991).

The Sixth Circuit in *Brotherton* clearly and unambiguously stated:

> "OHIO REV.CODE Sec. 2108.02(B), as part of the Uniform Anatomical Gift Act governing gifts of organs and tissues for research or transplants, expressly grants a right to Deborah Brotherton to control the disposal of Steven Brotherton's body. *Everman* expresses the

recognition that Deborah Brotherton has a possessory right to his body. 54 Ohio App.3d at 121, 561 N.E.2d 547. *Carney* allows a claim for disturbance of his body. 33 Ohio App.3d at 37, 514 N.E.2d 430. Although extremely regulated, in sum, these rights form a substantial interest in the dead body, regardless of Ohio's classification of that interest. **We hold the aggregate of rights granted by the state of Ohio to Deborah Brotherton rises to the level of a "legitimate claim of entitlement" in Steven Brotherton's body, including his corneas, protected by the due process clause of the fourteenth amendment.** (Emphasis added.)

We also hold the removal of Steven Brotherton's corneas were caused by established state procedures and that Ohio failed to provide the necessary predeprivation process."

The Sixth Circuit re-pronounced in even more certain terms in dealing with Michigan law in *Whaley*:

"All parties agree that the existence under Michigan law of a constitutionally protected property interest in a dead relative's body turns on our opinion in *Brotherton v. Cleveland*, 923 F.2d 477 (6th Cir.1991), where we found that such a property interest exists under Ohio law. .....We reversed, holding that Ohio law created a "legitimate claim of entitlement" and thus a property interest in a dead relative's body. Id. at 482..... **Because *Brotherton* is the law of this Circuit**, our decision in the present case turns on a comparison of Ohio and Michigan

law. If Michigan recognizes the same basic rights in a deceased person's body as Ohio, **then *Brotherton* controls and we must reverse** the district court. After reviewing Ohio and Michigan law, we conclude that they are in substance the same regarding the next of kin's rights in a deceased relative's body. **If anything, Michigan is even more explicit than Ohio in its acknowledgment of these rights.** (Emphasis added.)

"...MICH.STAT.ANN. Sec. 5.953(5) states that "[t]he county medical examiner shall, after any required examination or autopsy, promptly deliver or return the body to relatives or representatives of the deceased;" and MICH.STAT.ANN. Sec. 5.953(8) requires the state to return the body "to the person entitled to the custody or possession of [it]." Both of these statutes imply that the next of kin do indeed have a "right" to the deceased relative's body. ,,,, **we conclude that Michigan, like Ohio, provides the next of kin with a legitimate claim of entitlement and thus a property interest in a dead relative's body, including the eyes. Accordingly, the next of kin may bring a constitutional claim under the Due Process Clause.** (Emphasis added.)

This current Sixth Circuit panel has engrafted onto the Circuit precedents imaginary additional limiting language in an attempt to create a difference where one does not exist. This panel claims the distinction being one involving "a lawful autopsy." However, this panel overlooks or ignores that both *Brotherton* and

Whaley's "takings" were in fact done pursuant to a coroner's "lawful autopsy." All of these coroners get access to the bodies via performing a "lawful autopsy," that is not a distinguishing situation rather it is a common circumstance in every case. Such is nothing that sets it apart factually from binding precedent whatsoever.

This panel also attempts to use a "retrospective" analysis to determine Constitutional rights. This dangerous pseudo-intellectual approach is unworkable in the real world. Citizens must know what the law is and what the limitations are on their conduct presently, not wait for a future "retrospecto-scope" analysis. This is precisely the importance of *stare decisis*, particularly as to Constitutional rights. When a body part is taken and not returned to the family it is of no matter what "use" the body part is put to later. The subsequent use cannot retroactively turn an illegal act into a permissible one.

Neither *Brotherton* nor *Whaley* made any distinction that the Federal Constitutional right they announced only applied in cases where one "steals a body part for private gain" (as alleged by Respondents). In both cases it was the State actor (i.e. the coroner) and government, who were held liable constitutionally. Both precedents did not absolve the governmental State Actors. Whether eye banks or other third-parties did or did not make any profit was not part of the Constitutional analysis for purposes of finding liability for the "taking" by the governmental defendants.

The *federal* law as announced in those cases gave petitioner a protectable interest in her mother's

remains at the time of the conduct complained of in petitioner's complaint. Petitioner's cause of action accrued, and her rights vested, when that interest was violated by the defendants. Petitioner has the right to have her claims judged by that federal law which was in effect at the time of the conduct at issue as that law was established by the Sixth Circuit. As this Court observed in *Bouie v. Columbia*, 378 U.S. 347, 354 (1964), "a federal right turns upon the status of state law as of a given moment in the past -- or, more exactly, the appearance to the individual of the status of state law as of that moment."

The Sixth Circuit was fully capable of making the determination of state law as of that moment in the past, and it did so in *Whaley*. In fact, as petitioner has already explained in her Petition, given the fact that the analysis of the property interest at issue here involved the analysis of the *bundle* of rights and interests involved, rather than the interpretation of a *particular* statute or constitutional provision, the federal court was charged with rendering its binding ruling whether the range of interests recognized in Michigan, the sticks in the bundle, gave rise to a federally protected interest. And the Sixth Circuit in *Whaley* concluded that they did.

In *Whaley* the Sixth Circuit examined Michigan law and determined that the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. In reaching that conclusion the Sixth Circuit specifically held that "Michigan provides the next of kin with a constitutionally protected property interest in the dead

body of a relative."[1] The court in *Whaley* did not condition its holding on the fact an autopsy was performed, though one was, or on the fact that the eyes were removed outside the scope of the autopsy, just as the brain issue here was destroyed outside the scope of the autopsy. The court in *Whaley* determined as a fundamental principle, the fundamental principle which underlies petitioner's action, that "Michigan provides the next of kin with a constitutionally protected property interest in the dead body of a relative." This constitutionally protected property interest applied to the body and all its parts, including the eyes and the brain. This constitutionally protected property interest applies regardless of whether an autopsy is performed.

Attempt to set aside the precedent of *Whaley* and ship it to the state Supreme Court to overrule, as it sees fit, is not allowed. That tactic can not be permitted under a system with federal supremacy, regardless what label is used to accomplish it. Here, the argument that "Michigan law is at best equivocal"[2] falls flat in the face of *Whaley* which stated the opposite, and announced itself as the binding federal law of the Circuit.

Katherine Weins's brain was not retained as evidence, as petitioner concedes would have been permissible if a criminal prosecution is contemplated. It was only retained for examination. Once its examination was completed it was not returned to her

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[1] *Whaley*, 58 F.3d at 1116.

[2] *Waeschle v. Dragovic*, 576 F.3d 539, 550 (6th Cir. 2009).

next of kin, as it might easily have been, it was instead destroyed. Petitioner has never questioned the "police power" of the State to perform the autopsy; however, the Michigan autopsy statutes do not empower the Medical Examiner to destroy federally protected property rights. While the State may take temporary custody of property, it may not, without notice and due process, destroy it.

Simply put, the fact that an autopsy was performed, or that the autopsy was performed in connection with a potential criminal investigation, has absolutely no impact on petitioner's constitutionally protected right as recognized by the Sixth Circuit in *Whaley*. It simply cannot be argued that the state had any further need for Katherine Weins's brain at the time of its destruction since the destruction of her brain effectively prevented any further use of the brain for examination or as evidence. The destruction of Katherine Weins's brain thus could not have served any forensic purpose whatsoever. And no forensic purpose would have been thwarted by returning the brain to her next of kin for disposition as opposed to destroying it.

Under the law of the Sixth Circuit at the time at issue petitioner had a clearly established right to direct the disposition of Katherine Weins's brain after it was no longer needed for examination. Unless a state court has the right to overrule a federal decision, Petitioner has the right to have her case judged on its merits under the law that was in effect at the time the conduct at issue occurred.

Because that law was announced by a federal court in *Whaley* it was contrary to the fundamental

principles of federalism for the panel below to now direct the district court to certify its question to the Michigan Supreme Court. It was wrong for the panel that decided this case below to direct the district court to certify its question to the Michigan Supreme Court when the question had already been decided in *Whaley*. Instead, the panel should have decided the appeal based on the binding precedent of the Sixth Circuit. As this court noted in *Cohens v. Virginia*, 19 U.S. 264, 404 (1821) "[i]t is most true that this Court will not take jurisdiction if it should not: but it is equally true, that it must take jurisdiction if it should."

Respondents argue that petitioner has suffered no "harm" from the panel's directive to certify its question because the Michigan Supreme Court has not yet ruled, and may rule in petitioner's favor. Respondents miss the point entirely. It was the certification which was the harm. It was the certification which impermissibly granted the Michigan Supreme Court the right to review a published decision of the Sixth Circuit. It was the certification which impermissibly affords the Michigan Supreme Court the opportunity to be the final arbiters of Michigan's compliance with federal law. It was the certification which offends the fundamental principles federalism. And it is the violence done to these fundamental principles of federalism which is the compelling reason for this Court to grant petitioner's petition.

As respondents point out, the parallel case of *Albrecht v. Treon*, 118 Ohio St.3d 348, 2008-Ohio-2617 (2008), suffered a similar fate when an Ohio District Court ignored *Brotherton* and certified the case to the Ohio Supreme Court which completely overruled *Brotherton*.

The certification-punt herein does, in itself, deny Petitioner's rights. For one need not be a soothsayer to see that even if the Michigan Supreme Court agrees with the prior Sixth Circuit's ruling in *Whaley*, the federal courts will then hold that the law was "not clearly established" since their very certification proves that. So if this Court does not protect Federal jurisdiction and foreclose the Michigan Supreme Court from determining Federal law, Petitioner and the Federal system are already harmed.

This certification itself also does harm to Federalism (as well as Petitioners) by inviting a State court to retroactively overrule Federal precedent. Since petitioners have a right to their claims as recognized by the law that was in existence at the time, this maneuver empowers a State court to retroactively extinguish federally recognized Constitutional rights. This would allow State courts to immunize themselves from federal liability in violating federal civil rights – an intolerable, incongruent result.

The Federal Judiciary is the ultimate protectors of Federal rights. Such a sacred duty should not be relinquished for the mere convenience of respondents not wishing to take the time to notify next of kin of their "takings." This case presents significant abandonment of the efficacy of federal judicial precedent and federal court powers. Such an important transfer of power should invoke this Court attention to safeguard the Supreme Law of the land and to grant the within Writ. This Writ does present this court with an extraordinary situation which needs to be safeguarded by this Court's powers.

As Justice Kennedy explained in his concurring opinion in *United States Term Limits v. Thornton*, 514 U.S. 779, 838 (1995) "[f]ederalism was our Nation's own discovery." Concurring again in *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 287 (1993), Justice Kennedy, observed that "federal balance is a fragile one" and noted that "essential considerations of federalism are at stake here."

In *Wyoming v. Oklahoma*, 502 U.S. 437, 450-451 (1992), this court noted that the "serious and important concerns of federalism" found in that case were "fully in accord with the purposes and reach of our original jurisdiction." And after noting in *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) that "[w]hen a tax measure is challenged as an undue burden on an activity granted special constitutional recognition, however, the appropriate degree of inquiry is that necessary to protect the competing constitutional value from erosion" this Court observed that "[t]his consideration applies equally to * * * the maintenance of our constitutional federalism." In his concurring opinion in *Lehman Bros. v. Schein*, 416 U.S. 386, 393-394 (1974) Justice Rehnquist discussed this Court's decisions which "have dealt with the issue of how to reconcile the exercise of the jurisdiction which Congress has conferred upon the federal courts with the important considerations of comity and cooperative federalism which are inherent in a federal system, both of which must be subject to a single national policy within the federal judiciary." And in *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 523 (1986) this Court criticized the appellate court for giving "unwarrantedly short shrift to the important values of federalism and comity embodied in the Full Faith and Credit Act." These cases, along with

countless others, demonstrate that the preservation of the fundamental principles of federalism is a compelling reason for this Court to grant petitioner's petition.

In *Meredith v. Winter Haven*, 320 U.S. 228, 234 (1943) this court observed that

> diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience. Its purpose was generally to afford to suitors an opportunity in such cases, at their option, to assert their rights in the federal rather than in the state courts. In the absence of some recognized public policy or defined principle guiding the exercise of the jurisdiction conferred, which would in exceptional cases warrant its non-exercise, it has from the first been deemed to be the duty of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of a judgment.

That is what the Sixth Circuit did in *Whaley,* it decided questions of state law necessary to the rendition of its judgment, and its judgment was that under Michigan law the next of kin had in interest in the remains of their deceased loved ones that was protected by the Fourteenth Amendment. That was the law of the Sixth Circuit at the time the conduct here complained of took place. For the panel which rendered the decision below to direct the district court to certify a question on that same issue to the Michigan Supreme court when the issue had been decided as the law of the circuit is contrary to the fundamental principles of federalism. That is the

"harm;" that is the compelling reason for this Court to grant this petition; and that is the basis upon which the decision below must be reversed.

CONCLUSION

For the reasons set forth in Petitioner's Petition for a Writ of Certiorari, and as further set forth herein, petitioner respectfully requests that this Court grant her Petition for a Writ of Certiorari.

Respectfully submitted,

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